

Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard

Volume I

The Honourable
Mr. Justice Edward P. MacCallum
Commissioner

September 2008



Commission of Inquiry Into the
Wrongful Conviction of David Milgaard
Honourable Mr. Justice Edward P. MacCallum, Commissioner

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September 10, 2008

The Honourable Don Morgan, Q.C.
Attorney General
Room 355, Legislative Building
2405 Legislative Drive
Regina, Saskatchewan
S4S 0B3

Dear Mr. Attorney General:

**Re: Commission of Inquiry into the Wrongful Conviction of
David Milgaard**

Pursuant to Order in Council 84/2004, I have the honour to present to you
herewith my Report in the above matter.

Yours truly,



EDWARD P. MacCALLUM
Commissioner



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Foreword

David Milgaard was wrongfully convicted of murder on January 31, 1970, and served 23 years in prison. The enormity of such an injustice requires no further comment. He has been exonerated and compensated. His hope for this Inquiry is an explanation of why this happened to him and some assurance that others will not become victims in this way.

Briefly, the Terms of Reference direct us to inquire into the conduct of the investigation into the death of Gail Miller, the prosecution of David Milgaard, the question of whether the investigation should have been reopened earlier, and lastly, to make recommendations for the better administration of criminal justice in Saskatchewan.

Presented almost four years ago with some 341,634 pages of material, Commission staff faced a daunting task of organizing and preparing for the public hearings – one which they accomplished in less than a year.

There followed almost two years of public hearings which produced 40,774 pages of transcript and over 3,000 exhibits, all of which are available for public perusal on the internet at www.milgaardinquiry.ca. The effort to reduce the evidence into a coherent report of reasonable length has occupied our time since the close of hearings in December of 2006.

We are confident, however, that public exposure of all the facts for the first time has laid to rest many, if not all, of the vexing issues relating to this longstanding and regrettable chapter in the administration of justice in this province.

Joyce Milgaard led an epic struggle to free her son, beginning in about 1980 and running until he was released in 1992. In the course of that effort, the lives of a great many people were deeply affected, and public confidence in the administration of justice was shaken. David and Joyce Milgaard were foremost amongst those asking for a public inquiry, but many others whose interests had been affected over the years also welcomed a thorough public examination of all the facts and issues. At the close of public hearings, all parties, through their counsel, agreed that the effort had been worthwhile.

There is no simple explanation as to why David Milgaard was wrongfully convicted and why it took so long to reopen his case. I regret to say that not all the desired answers have emerged from the body of evidence. The case is historical and although the documents speak for themselves, there were, at times, critical failures to record. Although the available witnesses were many, some key ones are dead. Age, infirmity, hindsight, and mental reconstruction of events have affected the weight of the evidence, although most witnesses, despite the passage of time, were both credible and helpful.

The most intractable problem faced in getting all the answers stems from a lingering suspicion that trial evidence was gathered improperly.

The suspicion of police misconduct lives on. It has never been shown directly but it cannot be refuted to the satisfaction of all because circumstances surrounding the taking of two critical witness statements were not recorded when they should have been.

The Government of Saskatchewan has formally acknowledged that David Milgaard was convicted of a crime which he did not commit, and that he is factually innocent. The distinction between factual innocence and the legal presumption of innocence should be explained briefly for readers unfamiliar with

the criminal justice system. A person facing trial in criminal court is legally presumed innocent until proven guilty beyond a reasonable doubt. If the Crown fails to do this, the accused is found not guilty. There is no finding of factual innocence because that would not fall within the ambit or purpose of criminal law.¹

A Commissioner in a public inquiry is not part of the criminal trial process, and therefore has no jurisdictional difficulty to overcome in dealing with factual innocence. In this case, however, I have not been directed to make any findings in this respect. The Government of Saskatchewan, which called the Inquiry, has already acknowledged it.

The reader should also be aware that I am forbidden from making any findings of criminal or civil responsibility, and one further matter calls for preliminary comment. Under our rules, findings of misconduct against persons require notice. I have not made any and hence no notices have been sent. But to desist from identifying harmful actions, just because the reader might be critical of the actor, would be to render the process toothless. I have been generous in granting standing to anyone whose interests appeared to be engaged by the Terms of Reference. These persons were privileged participants in the Inquiry. Many of them were legally represented at public expense. Their actions were of course at issue, were vigorously defended, and are the subject of comment in this report. What I have to say will come as no surprise to them. Some, indeed, have publicly apologized.

Fourteen parties were granted standing in this Inquiry and are listed in Chapter 1.

As documentary evidence was presented to the Commission, each page was assigned a six-digit number. A document with more than one page is identified by the six-digit number on the first page. When reference to such evidence in the Report is made, it will be by the six-digit document identification number and will be shown in a footnote within the Report. When references are made to the transcript of the public hearing, they will be identified in a footnote, as, for example, "T5320", indicating the page on which the reference can be found.

Longer documents, or particularly important ones, will appear as appendices to the Report. Persons will be referred to by surname, unless there is a chance of confusion, as between persons sharing surnames.

The Report is based upon evidence which has accumulated from 1968 until the close of our hearings in October of 2006.

The Report is divided into two Volumes. Volume I includes a concise chronology of events, an overview of facts, an executive summary and a summary of findings and recommendations. The Executive Summary is intended to identify and summarize some important issues. The Overview of Facts represents a freestanding report in itself, much more detailed than the Executive Summary. Subsequent chapters in Volume II are organized on the basis of issues and significant events, where the reader will find more detail and source material identified.

A Chronology of Events appears in Chapter 2. It is intended to provide orientation to the reader by reference to undisputed facts. A more detailed chronology appears as Appendix "A".

Acknowledgments

From Commissioner MacCallum

This Inquiry proved to be unexpectedly complex and challenging. Both the time needed to accomplish the task and its cost have greatly exceeded initial estimates. In spite of this, the Government of Saskatchewan has remained fully supportive throughout. Although granted standing at the Inquiry as well as having called and paid for the Inquiry, the Government has managed its delicate task in a scrupulously non-partisan manner, in the interests of the better administration of criminal justice in this province.

Candace Cook served as Executive Director of the Commission of Inquiry from its inception until release of this report. Her management and communication skills were equal to the many challenges she faced in the preparation and public hearing phases of the Inquiry. Notwithstanding the term of three years devoted to these tasks, she graciously agreed to review and edit the report. She has been unfailingly cheerful and helpful to everyone concerned in the Inquiry. All of us owe her a great debt of gratitude.

The search for Commission Counsel was not difficult. Many prominent and highly qualified counsel expressed interest. Douglas Hodson, Q.C. of MacPherson Leslie & Tyerman LLP accepted an assignment which proved to be far more onerous than expected, requiring him to devote very long hours to the work of the Commission while still discharging responsibilities to a large and busy law practice. Notwithstanding the unwelcome length of the Inquiry, he has applied himself unreservedly to the public service asked of him.

Thanks are due to Mr. Hodson and other members of his firm for generously placing their facilities and personnel at the service of the Commission. I have asked Mr. Hodson to acknowledge individuals, but I feel obliged to personally thank counsel from his firm, Vanessa Monar Enweani, Jordan Hardy and John Agioritis for their invaluable contributions to the work of the Commission, and for constructive criticism and other contributions to the report.

I am personally indebted to our Document Manager, chief stenographer and factotum, Sandra Boswell, whose remarkable skills and work ethic made possible the electronic presentation of evidence at the public hearings, as well as the production of this report.

All of the above, together with those acknowledged by Mr. Hodson have rendered a significant public service by their participation in this Inquiry. What set them apart was their unflagging spirit of goodwill and devotion to the task and I am most grateful.

From Commission Counsel

I would like to acknowledge the contributions of a number of individuals who I had the pleasure of working with during the course of the Inquiry. The Commission staff are listed on page 7 of the Report.

I was fortunate to have the very able assistance of three lawyers from MacPherson Leslie and Tyerman LLP who served as Assistant Commission Counsel. I would like to thank Vanessa Monar Enweani, Jordan Hardy and John Agioritis for their advice and support provided throughout the Inquiry.

Document management was a critical task in our preparations and during the course of public hearings. Sandra Boswell and Kara Isabelle were of invaluable assistance to me, and to all counsel through the

course of the Inquiry. Kevin Short provided advice to the Commission on document management, allowing our Inquiry to operate efficiently. I would like to acknowledge and thank Mr. Short for his significant contributions to the Inquiry process.

I would like to thank our investigator Don Christal for his assistance in helping to locate and arrange interviews with many of the Inquiry's witnesses. I would also like to thank all of the Inquiry witnesses and other people we interviewed. Without exception, every witness was courteous and co-operative, making our task much easier.

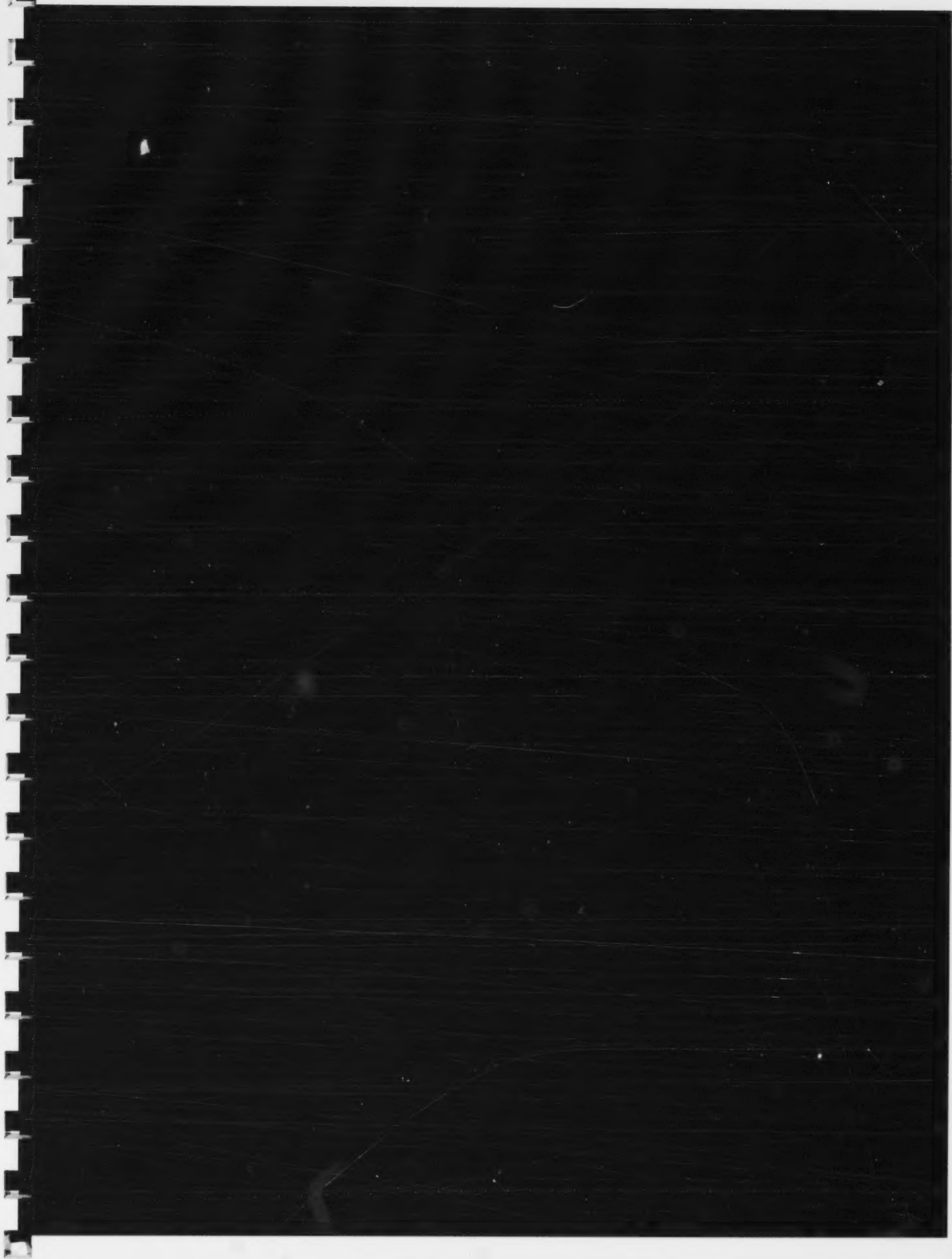
Special mention and thanks must be given to our Executive Director Candace Cook, our Commission Clerk Irene Beitel and our Taxing Officer Ed Beitel.

Counsel for the parties with standing are listed in Chapter 1 of the Report. They played a very important role in the Inquiry and I would like to acknowledge and thank all of the legal counsel who appeared before the Commission as counsel for parties or witnesses. I appreciated the professional courtesy and co-operation displayed by counsel, and very much enjoyed working with all of them.

Lastly, on behalf of my co-counsel and the Commission staff, I would like to thank Commissioner MacCallum for the privilege of serving on this Commission of Inquiry. The sincere and genuine interest expressed by Commissioner MacCallum in the lives and well-being of Commission personnel will be remembered by all those who worked with him well beyond the Inquiry process.

Chapter 1

Introduction



18 February 2004

TO THE HONOURABLE

THE LIEUTENANT GOVERNOR IN COUNCIL

The undersigned has the honour to report that:

1. Sections 2 and 5 of *The Public Inquiries Act* provide as follows:

"2 The Lieutenant Governor in Council, when he deems it expedient to cause inquiry to be made into and concerning a matter within the jurisdiction of the Legislature and connected with the good government of Saskatchewan or the conduct of the public business thereof, or that is in his opinion of sufficient public importance, may appoint one or more commissioners to make such inquiry and to report thereon.

5(1) The commissioners, if thereunto authorized by the Lieutenant Governor in Council, may engage the services of such accountants, engineers, technical advisors or other experts, clerks, reporters and assistants as they deem necessary or advisable, and also the services of counsel to aid and assist the commissioners in the inquiry."

2. It is deemed advisable and in the public interest that an inquiry be made into any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard on the charge that he murdered Gail Miller, for the purpose of making findings and recommendations with respect to the administration of criminal justice in the Province of Saskatchewan.

The undersigned has the honour, therefore, to recommend that Your Honour's Order do issue pursuant to sections 2 and 5 of *The Public Inquiries Act*:

- (a) appointing The Honourable Mr. Justice Edward P. MacCallum, Edmonton, as a Commissioner of a Commission of Inquiry into any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard on the charge that he murdered Gail Miller;

- 2 -

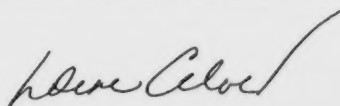
- (b) establishing the terms of reference of the Commission of Inquiry as set out in Schedule A, attached hereto;
- (c) directing the said Commission to make its report to the Minister of Justice and Attorney General in accordance with those terms of reference;
- (d) authorizing the Commission to engage:
 - (i) the services of such accountants, engineers, technical advisors or other experts, clerks, reporters and assistants as they deem necessary or advisable; and,
 - (i) the services of counsel to aid and assist the Commission; to be paid by the Department of Justice as approved by the Minister of Justice and Attorney General;
- (e) authorizing reimbursement to the commissioner by the Department of Justice for reasonable travelling and sustenance expenses incurred by him in the performance of his duties; and
- (f) Authorizing payment by the Department of Justice of expenses incurred in the administration of the Commission of Inquiry.

RECOMMENDED BY:



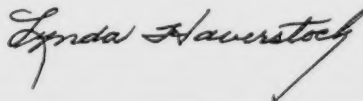
Minister of Justice and Attorney General

APPROVED BY:



President of the Executive Council

ORDERED BY:



Lieutenant Governor
Regina, Saskatchewan



Commission of Inquiry Into the Wrongful Conviction of David Milgaard

Honourable Mr. Justice Edward P. MacCallum, Commissioner

1020 - 606 Spadina Crescent East | Saskatoon, Saskatchewan S7K 3H1 | Phone: (306) 933-8306 | Fax: (306) 933-8305

The Commissioner	Commission Staff	Terms of Reference	Legal Information
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TERMS OF REFERENCE

1. The Commission of Inquiry appointed pursuant to this Order will have the responsibility to inquire into and report on any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard on the charge that he murdered Gail Miller. The Commission of Inquiry will also have the responsibility to seek to determine whether the investigation should have been re-opened based on information subsequently received by the police and the Department of Justice. The Commission shall report its findings and make such recommendations as it considers advisable relating to the administration of criminal justice in the province of Saskatchewan.
2. The Commission shall perform its duties without expressing any conclusion or recommendation regarding the criminal or civil responsibility of any person or organization, and without interfering in any ongoing criminal or civil proceeding.
3. The Commission shall complete its inquiry and deliver its final report containing its comments, findings, conclusions and recommendations to the Attorney General. The report must be in a form appropriate for release to the public, in accordance with *The Freedom of Information and Protection of Privacy Act* and other laws.
4. To the extent the Commission considers it advisable, it may rely on any transcript or record of any proceedings from any court in relation to the proceedings referred to above and on such other related material it considers relevant to its duties.
5. The Commission shall have the power to hold public hearings but may, at the discretion of the Commissioner, hold some proceedings *in camera*.
6. The Commission shall, as an aspect of its duties, determine applications by those parties, if any, or those witnesses, if any, to the public inquiry that apply to the Commission to have their legal counsel paid for by the Commission, and further, determine at what rate such Counsel shall be paid for their services.

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Commission Personnel

Commissioner

The Commissioner is a Judge of the Court of Queen's Bench of Alberta, appointed to that position in 1983. He also serves as a Deputy Judge of the Supreme Court of the Yukon, the Supreme Court of the Northwest Territories, and the Nunavut Court of Justice.

Commission Counsel and Staff

Mr. Douglas Hodson, Q.C. was appointed Commission Counsel in 2004. He is a partner with the law firm of MacPherson Leslie & Tyerman LLP. Mr. Hodson has been recognized on many occasions for his extensive volunteer work in his community of Saskatoon. In 2002 he received the Canadian Bar Association Community Service Award and in 2005 he received the Saskatchewan Centennial Medal. In 2007, Mr. Hodson received his Queen's Counsel designation and was inducted as a Fellow of the American College of Trial Lawyers.

Jordan Hardy, Vanessa Monar Enweani and John Agioritis served as Assistant Commission Counsel. Mr. Hardy is a partner with the law firm of MacPherson Leslie & Tyerman LLP in Regina. He served as President of the Regina Bar Association in 2003. Ms. Monar Enweani and Mr. Agioritis are associates in the Saskatoon office of MacPherson Leslie & Tyerman LLP.

Ms. Sandra Boswell served as the Commission's Document Manager. She is a paralegal with the law firm of MacPherson Leslie & Tyerman LLP in Saskatoon. Ms. Boswell was assisted by Kara Isabelle.

The Commission's office staff included Mel Thoen, Jodie Kendry, Cheryl Ellerman, Hilary Boswell and Tara Hiebert. Irene Beitel served as Clerk to the Commission and Ed Beitel as Taxing Officer. Karen Hinz and Don Meyer provided court reporting services. Don Christal acted as the Commission's investigator and Hugh Esson and Jerry Wilde as security officers. Kevin Short provided advice to the Commission on matters related to document management and Larry Prehodchenko served as the Commission's audio technician.

Executive Director

Ms. Candace Cook graduated from the University of Saskatchewan (B.A. Honours) in 1995. She joined the Commission from the Communications and Public Education branch of Saskatchewan Justice and Saskatchewan Corrections and Public Safety. Ms. Cook has served as Executive Director to the Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild and has held previous positions with private and non-profit agencies.

Parties and Procedures

The majority of witnesses who appeared at the Inquiry had previously testified in judicial proceedings related to the case, or had given statements to investigators over the course of some 37 years since the trial of David Milgaard.

Our public hearing was in no sense a retrial, but it was important for us in evaluating the investigation and the subsequent criminal proceedings, to determine whether witnesses' present recall of events was consistent with what they said at trial, or between the time of trial and the Inquiry. Even during the reopening phase of the Inquiry, witnesses gave evidence about events which they had previously described to investigators or before tribunals, but also much that was new, enabling us to deal with the vexing question of whether the investigation into the death of Gail Miller should have been reopened sooner, based upon information which came to the attention of the police or the Department of Justice.

Over the years, great tension developed between the Milgaard group on the one hand and police and Crown authorities, both provincial and federal, on the other. Public confidence in the administration of justice was seriously weakened.

The Inquiry was less than ideal in terms of the adversarial approach taken by some parties – perhaps unavoidably so, given all that has transpired.

The Commission concluded that the wide Terms of Reference had to be dealt with comprehensively, and long-standing accusations of official wrongdoing needed to be addressed in detail. The Inquiry heard from 114 witnesses and examined 3,200 documents, some of them hundreds of pages in length. These documents, together with 40,774 pages of hearing transcript, are now available as a permanent electronic record on the Commission web site at www.milgaardinquiry.ca.

Parties given standing at the Inquiry, together with counsel representing them, are:

PARTY	COUNSEL	STATUS
The Association in Defence of the Wrongly Convicted (AIDWYC)	Mr. Julian Roy	Standing and Funding
Mr. David Asper	Mr. Donald Sorochan, Q.C.	Standing and Funding
Mr. T.D.R. Caldwell	Ms. Catherine Knox Mr. Silas Halyk, Q.C. (2nd) Mr. Bob Kennedy, Q.C. (2nd)	Standing and Funding
Mr. Larry Fisher	Mr. Brian A. Beresh, Q.C. Mr. Eamon O'Keefe (2nd)	Standing and Funding
Government of Saskatchewan	Ms. Lana Krogan-Stevely	Standing
Mr. Eddie Karst	Mr. Aaron Fox, Q.C. Mr. Chris Boychuk (2nd)	Standing and Funding
Mr. Serge Kujawa	Mr. Garrett Wilson, Q.C. Mr. Jay Watson (2nd)	Standing and Funding
Mr. David Milgaard	Mr. Hersh Wolch, Q.C. Ms. Cheryl Stanley (2nd)	Standing and Funding

PARTY	COUNSEL	STATUS
Ms. Joyce Milgaard	Mr. James Lockyer Ms. Joanne McLean (2nd)	Standing and Funding
Minister of Justice (Canada)	Mr. David Frayer, Q.C. Ms. Jennifer Cox (2nd)	Standing
Royal Canadian Mounted Police	Mr. Bruce Gibson Ms. Rochelle Wempe (2nd)	Standing
Saskatoon Police Service	Mr. Richard Elson Mr. John Beckman, Q.C. (2nd) Mr. Pat Loran (2nd)	Standing and Funding
Mr. Calvin Tallis	Mr. Alexander Pringle, Q.C. Mr. Marshall Hopkins (2nd) Mr. Dino Bottos (2nd) Mr. Daniel Chivers (2nd)	Standing and Funding
Mr. Eugene Williams	Mr. Ken McLeod	Standing

Parties were allowed one designated counsel but approval was given to alternates to act when needed. They are listed as well, but funding was allowed for only one counsel performing a given service.

Chapter 2

Chronology of Events and Persons Referenced in Report

Events Prior to Trial

- | | |
|-------------|---|
| Oct-21-1968 | Fisher Victim 1 (FV1) is sexually assaulted by Larry Fisher near 18th Street between Avenues G and H in Saskatoon. |
| Nov-13-1968 | Fisher Victim 2 (FV2) is sexually assaulted by Larry Fisher near 18th Street between Avenues E and F in Saskatoon. |
| Nov-29-1968 | Fisher Victim 3 (FV3) is sexually assaulted by Larry Fisher near Wiggins Avenue and Temperance Street in Saskatoon. |
| Dec-14-1968 | Saskatoon Police issue a warning in the Saskatoon StarPhoenix advising of the assaults and telling women not to talk to strangers or walk in dark areas of the city. The Saskatoon Police believe the three assaults were committed by the same assailant but they do not have any suspects. Larry Fisher had no prior record and was not known to the Saskatoon Police at the time. He was not a suspect in the initial investigation of the assaults. |

Jan-31-1969	David Milgaard, Ron Wilson and Nichol John travel from Regina to Saskatoon and arrive in the early morning at approximately 6:30 a.m., looking for the home of Albert Cadrain. They become lost, get stuck twice and eventually arrive at Albert Cadrain's home at 334 Avenue O South at approximately 9:00 a.m. Larry Fisher and his wife Linda Fisher reside in the basement of the Cadrain house. David Milgaard and his friends leave later that day for Calgary and are joined on the trip by Albert Cadrain.
Jan-31-1969	Gail Miller leaves her house at 130 Avenue O South shortly after 6:45 a.m. to catch a bus to work. She usually catches the bus at the corner of 20th Street and Avenue O. She is sexually assaulted and murdered. Her body is discovered in an alley about a block south of her residence at around 8:30 a.m.
Jan-31-1969	Victim 12 (V12) is indecently assaulted by an unknown assailant on Avenue H between 20th Street and 21st Street in Saskatoon, approximately seven blocks from where Gail Miller's body was found. She reports to Saskatoon Police that the assault occurred at 7:07 a.m.
Feb-03-1969	As part of a general canvass of people in the neighbourhood, Larry Fisher is questioned by police while waiting for his bus. He is not questioned as a suspect but rather to determine whether he saw anything unusual on the morning of Gail Miller's murder. He tells police that on January 31, 1969 he caught the bus to work at 6:30 a.m. at Avenue O and 20th Street and saw nothing unusual. Police note that he works at Masonry Contractors, wears a yellow hard hat, and lives at 334 Avenue O South.
February 1969	The Saskatoon Police investigate the possibility that Gail Miller's assailant is the same person who committed the earlier sexual assaults. Between January 31, 1969 and March 2, 1969, Saskatoon Police investigate and eliminate over 160 people as potential suspects in Gail Miller's murder.
Mar-02-1969	Albert Cadrain voluntarily contacts Saskatoon Police to report suspicious behavior by David Milgaard on the morning of Gail Miller's murder. He tells police that he saw blood on David Milgaard's clothing on the morning of January 31, 1969 and that he thinks David Milgaard may have killed Gail Miller. David Milgaard was not a suspect nor was he known to the Saskatoon Police prior to Albert Cadrain contacting the Saskatoon Police.
Mar-03-1969	David Milgaard is apprehended in Winnipeg and questioned by Saskatoon Police and the RCMP. He answers questions regarding his activities on the morning of January 31, 1969 and police search his hotel room and belongings.
Mar-03-1969	Ron Wilson is interviewed by the RCMP in Regina. He denies any knowledge of Gail Miller's murder and indicates that he was not separated from David Milgaard on the morning of the murder for any more than two minutes.
Mar-11-1969	Nichol John is interviewed by the RCMP in Regina. She indicates that at no point during the morning of January 31, 1969 was she separated from David Milgaard or Ron Wilson for more than one or two minutes.

Mar-18-1969	Ron Wilson, Nichol John and Albert Cadrain are interviewed again by Saskatoon Police. No new information is provided.
Apr-04-1969	Gail Miller's wallet is found in the snow in the 300 block of Avenue O South, a few houses north of the Cadrain residence.
Apr-18-1969	David Milgaard is questioned by police and provides blood, hair and saliva samples. He denies any involvement in the murder of Gail Miller.
May-1969	David Milgaard is partying with Craig Melnyk, Ute Frank, Deborah Hall, George Lapchuk, Bob Harris and perhaps others in a Regina motel room and is heavily under the influence of drugs. After a television news story about the Gail Miller murder, he is teased about being a suspect and he responds by stabbing a pillow with his hand and uttering words to the effect that he stabbed and killed Gail Miller. The Saskatoon Police do not become aware of this incident until the eve of David Milgaard's trial.
May-16-1969	Saskatoon Police and RCMP meet and agree that David Milgaard is a prime suspect and further effort should be made to eliminate or implicate him in the offence. Arrangements are made to have Ron Wilson and Nichol John undergo a polygraph test with Inspector Art Roberts of the Calgary Police Service.
May-21 and 22-1969	Ron Wilson and Nichol John are interviewed by the Saskatoon Police and brought to Saskatoon to be polygraphed by Inspector Roberts.
May-23-1969	Inspector Roberts interviews Ron Wilson and performs a polygraph. After the polygraph, Ron Wilson provides new and significant incriminating evidence against David Milgaard, including an alleged admission. Inspector Roberts interviews Nichol John but does not perform a polygraph. After being questioned by Inspector Roberts, Nichol John reports to him that she now remembers seeing the murder. The next day, Nichol John provides a statement to police claiming she witnessed David Milgaard stab Gail Miller.
May-30-1969	David Milgaard is arrested for the murder of Gail Miller.

Trial and Appeal Proceedings

Aug-18-1969	David Milgaard's preliminary hearing commences.
Sep-11-1969	David Milgaard is committed to stand trial.
Jan-18-1970	While being transported to Saskatoon to testify at David Milgaard's trial, Ron Wilson tells the Saskatoon Police about the Regina motel room incident. Ron Wilson was not present but was told by Craig Melnyk and George Lapchuk that David Milgaard had re-enacted and admitted killing Gail Miller. They later testify at David Milgaard's trial.
Jan-19-1970	Saskatoon Police interview and obtain statements from Craig Melnyk, George Lapchuk and Ute Frank regarding the motel room incident.

Chapter 2 Chronology of Events and Persons Referenced in Report

Jan-19-1970	David Milgaard's trial commences before Chief Justice Bence and a jury.
Jan-21-1970	Nichol John testifies at David Milgaard's trial, but she does not say that she witnessed David Milgaard stab Gail Miller as she claimed in her May 24, 1969 statement to Saskatoon Police. The prosecutor is allowed to read the statement to the jury as part of his examination of Nichol John.
Jan-29-1970	The prosecution completes its case. David Milgaard elects not to testify nor to call any evidence.
Jan-31-1970	David Milgaard is found guilty of the murder of Gail Miller.
Feb-21-1970	Fisher Victim 4 (FV4) is sexually assaulted by Larry Fisher in the 200 block of Avenue V South in Saskatoon.
Jul-1970	Larry Fisher goes to Fort Garry, Manitoba to work on a construction project.
Aug-02-1970	Fisher Victim 5 (FV5) is sexually assaulted by Larry Fisher in Fort Garry, Manitoba.
Sep-19-1970	Larry Fisher is arrested while sexually assaulting Fisher Victim 6 (FV6) in Fort Garry, Manitoba. He confesses to the sexual assaults of FV5 and FV6.
Oct-21-1970	Larry Fisher tells the Fort Garry police that he committed two earlier sexual assaults in Saskatoon.
Oct-22-1970	Det. Eddie Karst of the Saskatoon Police travels to Winnipeg and interviews Larry Fisher. Larry Fisher admits to the sexual assault of FV4 and the indecent assault of FV3 in Saskatoon. He does not admit to the sexual assaults of FV1 and FV2.
Nov-06-1970	David Milgaard's appeal is heard by the Saskatchewan Court of Appeal.
Dec-30-1970	Larry Fisher is charged with the rapes of FV1, FV2 and FV4 and the indecent assault of FV3 in Saskatoon.
Jan-05-1971	David Milgaard's appeal is dismissed by the Saskatchewan Court of Appeal.
May-28-1971	Larry Fisher pleads guilty in Winnipeg and is convicted of the rapes of FV5 and FV6.
Nov-15-1971	The Supreme Court of Canada denies David Milgaard's application for leave to appeal.
Dec-21-1971	Larry Fisher pleads guilty in Regina Court of Queen's Bench to three charges of rape (FV1, FV2 and FV4) and one charge of indecent assault (FV3) relating to his 1968 and 1970 attacks on women in Saskatoon.

Post Conviction Events

Jan-26-1980	Larry Fisher is released from the penitentiary in Prince Albert on mandatory supervision.
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Chapter 2 Chronology of Events and Persons Referenced in Report

Mar-31-1980	Larry Fisher sexually assaults and attempts to murder Fisher Victim 7 (FV7) in North Battleford.
Apr-3-1980	Larry Fisher is charged with the rape and attempted murder of FV7.
Aug-22-1980	David Milgaard escapes from Stony Mountain Institution and remains at large until November 8, 1980 when he is shot and recaptured by the RCMP.
Aug-28-1980	Linda Fisher (Larry's ex-wife) voluntarily attends at the Saskatoon Police station and provides a written statement to the Saskatoon Police saying that she believes Larry Fisher may have killed Gail Miller. The Saskatoon Police do not follow up on the statement.
Dec-23-1980	The Milgaard family issues a news release and distributes a reward poster to residents of Saskatoon offering \$10,000 to any person able to provide information that will exonerate David Milgaard.
Dec-24-1980	Joyce Milgaard retains Saskatoon lawyer Gary Young.
Apr-28-1981	Joyce Milgaard retains Regina lawyer Tony Merchant.
Jun-11-1981	Larry Fisher is convicted of the attempted murder and rape of FV7.
1981-1983	Joyce Milgaard and supporters interview the key trial witnesses along with defence and prosecution counsel.
Mar-1983	The Milgaards learn from Cadrain family members that at the time of Gail Miller's murder, Larry Fisher lived in the basement of the Cadrain home at 334 Avenue O South and that he was later convicted of rape.
Mar-26-1983	The Milgaards place an advertisement in the Saskatoon StarPhoenix in an attempt to locate Linda Fisher. Both she and her common-law husband reply to the advertisement but neither are contacted by the Milgaards.

Conviction Review Proceedings

Jan-16-1986	Joyce Milgaard retains Winnipeg lawyer Hersh Wolch.
Nov-23-1986	Deborah Hall, one of the individuals present during the motel room incident in May, 1969, swears an affidavit in which she states that Craig Melnyk and George Lapchuk both lied at trial when they said David Milgaard re-enacted and admitted murdering Gail Miller.
Nov-26-1986	David Milgaard swears an affidavit in which he denies re-enacting the murder in a motel room in May, 1969, and asserts his innocence.
Sep-13-1988	Dr. Ferris provides a report to David Milgaard's legal counsel concluding, on the assumption that David Milgaard is a non-secretor of A antigens, that the serological evidence (in relation to semen found near Gail Miller's body) presented at his trial excluded him as the perpetrator of the murder. He also reports that his attempts to obtain sufficient DNA from Gail Miller's clothing to carry out a genetic typing analysis were unsatisfactory.

Chapter 2 Chronology of Events and Persons Referenced in Report

Dec-28-1988	David Milgaard applies to the federal Minister of Justice for review of his conviction pursuant to s. 690 of the <i>Criminal Code</i> . David Milgaard alleges that the scientific evidence used to convict him at trial was exculpatory, and that the evidence regarding the motel room incident was fabricated.
May-8-1989	Hersh Wolch forwards to the federal Minister of Justice additional documentation required to complete David Milgaard's s. 690 application for mercy.
Aug-8-1989	Patricia Alain, Chief of Serology with the RCMP laboratory reviews Dr. Ferris' report and advises federal Justice lawyer Eugene Williams that (1) due to the possibility of contamination, there is no conclusive proof that the donor of semen found at the murder scene was an "A" secretor, and (2) more importantly, the assumption in Dr. Ferris' report that David Milgaard is a non-secretor, based on tests conducted in 1969, is questionable. A new test would have to be conducted to determine the actual secretor status of David Milgaard.
Nov-6-1989	Eugene Williams questions Deborah Hall under oath on her sworn affidavit and her recollections of the May 1969 motel room incident. She contradicts her affidavit and confirms that David Milgaard did re-enact the murder and utter words to the effect that he had stabbed and killed Gail Miller but she thought he was joking.
Nov-7-1989	Eugene Williams questions Nichol John about the events of January 31, 1969 and her May 24, 1969 statement to police. Her recollection of events is poor but she is able to draw a map of the crime scene. During the interview she reports having a flashback of a man stabbing a woman.
Feb-26-1990	Hersh Wolch receives an anonymous tip that Larry Fisher committed the murder of Gail Miller. This information is passed on to federal Justice lawyers who engage the RCMP to investigate Larry Fisher as a suspect in Gail Miller's murder. The RCMP do not find any evidence to link Larry Fisher to Gail Miller's murder.
Jun-4-1990	Dr. Markesteyn, chief Medical Examiner of the Department of Justice in Manitoba, provides a report to David Milgaard's legal counsel concluding (on the assumption David Milgaard is a non-secretor and the semen sample is uncontaminated) that the serological evidence presented at trial failed to link him to the murder. No steps are taken to verify David Milgaard's status until February 1992 when it is determined that he is a secretor. Dr. Markesteyn also suggests in his report that the semen found in the snow at the crime scene could have been dog urine and that tests should have been done to exclude this possibility. It is incorrectly reported in several media stories that the evidence used to convict David Milgaard was dog urine. Eugene Williams investigates and learns that appropriate tests were done in 1969 to confirm that the semen was of human origin.

Chapter 2 Chronology of Events and Persons Referenced in Report

- Jun-4-1990 Ron Wilson provides a statement to Milgaard investigator Paul Henderson recanting his trial testimony, stating that he was coerced by police and that he believes David Milgaard is innocent. The statement is first given to the media and then provided to Eugene Williams. Eugene Williams reviews the statement, interviews Ron Wilson, and concludes that little weight should attach to the recantation.
- Jun-15-1990 Eugene Williams interviews Albert Cadrain who says that although he was distressed by repeated police questioning, he told the truth at David Milgaard's trial. On June 24, 1990, Milgaard investigator Paul Henderson obtains a statement from Albert Cadrain who does not recant his trial testimony but says he was abused by police who put him through "mental hell and torture". The statement is widely reported in the media and provided to Eugene Williams. Eugene Williams follows up with interviews of Albert's siblings and other witnesses, and concludes there is no merit to the allegations of police abuse.
- Jul-9-1990 A polygraph examination is conducted on Larry Fisher, but due to his mental and physical state the test is inconclusive. Eugene Williams interviews Larry Fisher on July 12, 1990. While he acknowledges using a paring knife in some of his sexual assaults, he denies any involvement in the murder of Gail Miller.
- Oct-1-1990 Legal counsel for David Milgaard and for the federal Department of Justice meet in Ottawa to discuss the grounds advanced in support of David Milgaard's s. 690 application. Documents including transcripts, reports and portions of the police and prosecutor's file are provided to David Milgaard's legal counsel.
- Nov-14-1990 The Honourable William R. McIntyre, Q.C., former member of the Supreme Court of Canada, is retained by the Department of Justice to review the case in detail, and to provide advice to the federal Minister on David Milgaard's application for mercy. Justice McIntyre provides his advice to the federal Minister on February 7, 1991. Neither the advice he provides nor the information on which it is based, are disclosed to David Milgaard's legal counsel.
- Feb-27-1991 The federal Minister of Justice dismisses David Milgaard's first s. 690 application.
- Aug-14-1991 David Milgaard files a second s. 690 application, focusing on Larry Fisher. The application is based on interviews with Larry Fisher's victims and includes a statement from Gail Miller's family indicating that in light of new evidence presented to them by Centurion Ministries, Inc. they feel there is reasonable doubt as to the guilt of David Milgaard.
- Aug-16-1991 After a press conference held by Jim McCloskey of Centurion Ministries, Inc., allegations that David Milgaard was framed by the Saskatoon Police and that Larry Fisher's convictions were deliberately covered-up, are widely reported in the media.

Chapter 2 Chronology of Events and Persons Referenced in Report

- Aug-29-1991 After seeing a picture of Larry Fisher in an August 11, 1991 newspaper article, V12 asserts that Larry Fisher is the man who indecently assaulted her on January 31, 1969. Her written statement is provided to David Milgaard's legal counsel and to the federal Department of Justice.
- Aug-29-1991 An article appears in the *Globe and Mail* alleging that Saskatoon Police files involving convicted rapist Larry Fisher have recently disappeared, and that an internal investigation is under way. The Saskatchewan Police Commission inquires into the allegations and concludes in its November 29, 1991 report that there is no evidence of tampering with police files, and no merit to the allegation that someone in the Saskatoon Police department tried to conceal the existence of Larry Fisher and his convictions for sexually assaulting four Saskatoon women.
- Nov-28-1991 The federal Minister of Justice refers David Milgaard's case to the Supreme Court of Canada for a hearing. David Milgaard, the Attorney General of Saskatchewan and the Attorney General of Canada are granted status as parties before the Court. Prior to the commencement of hearings, Larry Fisher is also granted standing.
- Jan-16-1992 The Supreme Court of Canada Reference Case begins and David Milgaard is the first witness. The Court also hears evidence from Larry Fisher, the key witnesses at David Milgaard's trial, and police witnesses.
- Apr-06-1992 The Supreme Court of Canada Reference Case concludes.
- Apr-14-1992 The Supreme Court of Canada concludes that David Milgaard failed to establish his innocence. However, they find that new evidence placed before them could reasonably be expected to have affected the verdict, and recommend to the federal Minister that she set aside the conviction and direct that a new trial be held. On the same day, the federal Minister directs the holding of a new trial pursuant to s. 690(a) of the *Criminal Code*.
- Apr-16-1992 David Milgaard is released from jail. He is charged with second degree murder but a new trial is not held. Instead, the Crown enters a stay of proceedings pursuant to s. 579 of the *Criminal Code*. The Attorney General of Saskatchewan states that the provincial government will not order an inquiry or compensate David Milgaard.

Post Release Events

- Sep-19-1992 Joyce Milgaard, David Milgaard and Hersh Wolch hold a news conference alleging wrongdoing and a cover-up by police, Saskatchewan Justice officials, and then Premier Roy Romanow in the handling of David Milgaard's case.

Chapter 2 Chronology of Events and Persons Referenced in Report

Oct-09-1992	The Saskatchewan Deputy Minister of Justice refers allegations of wrongdoing in the handling of David Milgaard's case to the RCMP for investigation (Project Flicker). The Deputy Attorney General of Alberta is asked to direct the RCMP investigation and make any charging decisions. Over the next two years, a team of 10 RCMP officers conduct an extensive investigation into 68 allegations of wrongdoing against police and Crown officials.
Aug-16-1994	The Saskatchewan Deputy Minister of Justice makes public the results of the RCMP investigation and the Alberta Justice Report, concluding that there was no criminal wrongdoing nor any attempt to obstruct justice in the investigation or prosecution of David Milgaard. The full RCMP Report is later released to the public on July 12, 1995.
Jul-18-1997	The results of DNA testing conducted by the Forensic Science Service in the United Kingdom indicate that the semen found on Gail Miller's panties and dress could not have originated from David Milgaard, and that it matched Larry Fisher's DNA profile.
Jul-18-1997	The Department of Justice (Canada) states that the results of DNA testing show that a terrible wrong was done to David Milgaard by his wrongful conviction. The federal Minister of Justice expresses her sympathies and regrets to David Milgaard and his family.
Jul-18-1997	The Saskatchewan Minister of Justice states that a wrong of the most serious kind has been done to David Milgaard by the justice system, and he apologizes. He also states that the wrongful conviction will require compensation, he is considering a public inquiry, and the police investigation into the case has been reopened.
Jul-25-1997	Larry Fisher is arrested and charged with the rape and murder of Gail Miller.
Aug-19-1997	The Saskatchewan Minister of Justice announces that the Government of Saskatchewan will enter into compensation negotiations with David Milgaard for his wrongful conviction, and that a public inquiry will be held.
May-17-1999	The Saskatchewan Minister of Justice announces that a settlement has been reached with David Milgaard and his family, and that compensation will be paid in the amount of \$10 million.
Nov-22-1999	Larry Fisher is convicted of the murder of Gail Miller.
Sep-29-2003	Larry Fisher's appeal to the Saskatchewan Court of Appeal is dismissed.
Feb-18-2004	The Government of Saskatchewan orders a public inquiry into the wrongful conviction of David Milgaard.
Aug-26-2004	Larry Fisher's application for leave to appeal to the Supreme Court of Canada is dismissed.

List of Individuals Mentioned in this Report

Name	Role & Description
Alain, Patricia	Chief Scientist Serology, RCMP Central Forensic Laboratory, Ottawa, Ontario between April 1989 and July 1992. Ms. Alain provided assistance to Eugene Williams of federal Justice during David Milgaard's s. 690 applications and examined the exhibits from Gail Miller's trial during the Supreme Court Reference.
Armstrong, Celine	Albert Cadrain's sister. She was 20 years old and lived with the Cadrain family at 334 Avenue O South on January 31, 1969. She was home when David Milgaard arrived.
Asper, David	Legal counsel to David Milgaard from 1986 to June 1992.
Barber, Michael	Senior forensic scientist with the Forensic Science Service in Wetherby, United Kingdom. Mr. Barber prepared the July 18, 1997 report respecting the DNA results in the Gail Miller case.
Bartlett, Sandra	CBC investigative reporter and journalist involved in researching and investigating David Milgaard's claim of wrongful conviction in the 1980s and 1990s.
Beauchamp, Giles	Lived at 1505 - 20th Street West in 1969. He and Norman Remenda found Gail Miller's wallet in the snow in April of 1969.
Bennett, Maurice	In 1969, he was a detective with the Saskatoon Police and assisted with the Miller murder investigation by doing a house to house check on 20th Street. He also interviewed Mary Gallucci, Marie Indyk, and took Victim 12's statement on January 31, 1969.
Blake, Dr. Edward	He was designated by David Milgaard's counsel to act as his scientific representative in the testing of the Gail Miller exhibits in England in 1997.
Boyd, Neil	Professor and Director of the School of Criminology at Simon Fraser University, who co-authored a report with Kim Rossmo entitled "Milgaard v. The Queen: Finding Justice - Problems and Process" dated October 1991.
Brecelj (nee Markwart), Linda	Gail Miller's friend and roommate at 130 Avenue O South in 1969. She attended a party with Gail Miller the night before the murder.
Breckenridge, Michael	Contacted David Milgaard's legal counsel in March of 1992 alleging that he worked in the office of the Saskatchewan Attorney General and that the Fisher and Milgaard files were mishandled.
Brown, Murray	He was Appellate Counsel and Director of Appeals with the Attorney General of Saskatchewan between 1990 and 1997. He and Eric Neufeld acted as counsel for Saskatchewan Justice during the s. 690 Reference hearings before the Supreme Court of Canada in 1992.

Chapter 2 Chronology of Events and Persons Referenced in Report

Name	Role & Description
Bruce, Robert	Volunteer and supporter of David Milgaard who investigated various aspects of David Milgaard's conviction in the early 1990s.
Cadrain, Barbara	Albert Cadrain's former spouse (between 1973 and 1987).
Cadrain, Albert	David Milgaard's acquaintance and traveling companion in 1969. He resided at 334 Avenue O South, Saskatoon on January 31, 1969. He provided a statement to Saskatoon City Police on March 2, 1969 indicating, among other things, that David Milgaard was in the vicinity of the crime scene on the morning of the murder and had blood on his clothes.
Cadrain, Dennis	Albert Cadrain's brother. He attended the police station with his brother, Albert, on March 2, 1969.
Cadrain, Estelle	Albert Cadrain's mother.
Cadrain, Kenneth	Albert Cadrain's brother. He lived with his family at 334 Avenue O South and was five years old in January, 1969. He was at home the morning of January 31, 1969 when David Milgaard arrived.
Caldwell, T.D.R.	Crown prosecutor at Milgaard's trial.
Campbell, (Rt. Hon) Kim	Federal Minister of Justice and Attorney General from February 23, 1990 to January 3, 1993. She was the Minister responsible for making decisions respecting David Milgaard's applications for mercy under s. 690 of the Criminal Code.
Carlyle-Gordge, Peter	Freelance journalist and writer. He worked as the Manitoba correspondent for Macleans Magazine between 1978 and 1983 and was actively involved in investigating David Milgaard's conviction with Joyce Milgaard in the early 1980s.
Charland, Anne-Elizabeth	Forensic Biologist, RCMP Central Forensic Laboratory, Ottawa, Ontario. She was a specialist in forensic application of DNA typing and testified at Larry Fisher's trial.
Chartier, Gerard (Rusty)	Member of Saskatoon Police from 1960 to 1988. In 1969, he was involved in special surveillance and was part of the National Criminal Intelligence Unit.
Corbett, William	Senior General Counsel and Acting Assistant Deputy Attorney General of Canada, Criminal Prosecutions Section, at the time of Milgaard's s. 690 applications. Eugene Williams reported to Mr. Corbett, among others.
Cressman, Beverly	He was a member of the Saskatoon Police Service between 1958 and 1990 and was in the Morality Section between 1968 and 1971. He was in charge of the rape investigation of Fisher Victim 1 in 1968 and conducted surveillance on the Miller crime scene in 1969.

Chapter 2 Chronology of Events and Persons Referenced in Report

Name	Role & Description
Danchuk, Walter and Sandra	Sandra and her husband, Walter, encountered David Milgaard, Ron Wilson and Nichol John when Wilson's vehicle became stuck in the back alley behind their basement suite on 129 Avenue T South, Saskatoon on the morning of January 31, 1969.
Diewold, Henry	Caretaker at St. Mary's Church in January of 1969. On the morning of January 31, 1969 he spotted vehicle headlights facing west in the east-west portion of the T-shaped alley where Gail Miller's body was discovered.
Doell, Simon	He lived on Avenue R South in the months prior to the Miller murder. He took the 20th Street bus to work and recalled seeing a nurse riding the same bus from time to time.
Duffus, Murray	Lived on the southwest corner of 20th Street and Avenue O on January 31, 1969. He did not observe or hear anything unusual when departing for work at 6:45 a.m. on that date.
Edmondson, Thomas (Stan)	RCMP Staff Sergeant involved in assisting the Saskatoon City Police with the Gail Miller murder investigation in 1969. S/Sgt. Edmondson assisted Detective Karst with his interview of David Milgaard on March 3, 1969.
Edwards, Launa	George Lapchuk's former spouse. Ms. Edwards testified at the Supreme Court Reference.
Edwards, Peter	Toronto Star reporter and co-author of Joyce Milgaard's book, "A Mother's Story".
Elliott, Dennis	He hosted a party attended by Gail Miller and some of her roommates on January 30, 1969. He drove Gail Miller home from the party at approximately 1:15 a.m. on January 31, 1969 and saw a man sitting in a 1963 Pontiac Parisienne across from 130 Avenue O South.
Emson, Dr. Harry	Forensic pathologist who performed the autopsy on Gail Miller's body on January 31, 1969.
Fainstein, Ronald	Senior General Counsel, Litigation Sector, between 1989 and 1992. He acted for the federal Department of Justice before the Supreme Court of Canada at the s. 690 Reference hearings in 1992.
Ferris, Dr. James	Forensic pathologist who provided an opinion to David Milgaard's legal counsel in September 1988.
Fisher, Larry	Lived in the basement of the Cadrain residence at 334 Avenue O South, Saskatoon on January 31, 1969. In 1971, he was convicted of three rapes and one indecent assault committed in Saskatoon in late 1968 and early 1970. He was subsequently convicted of the murder of Gail Miller on November 22, 1999.

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Name	Role & Description
Fisher, Linda	Larry Fisher's former spouse. She lived with Larry Fisher in the basement of the Cadrain residence at 334 Avenue O South in Saskatoon in January of 1969. She provided a statement to Saskatoon Police on August 28, 1980 which cast suspicion on Larry Fisher as Gail Miller's murderer.
Fleming, Dr. Russel	Psychiatrist at the Mental Health Centre in Penetanguishene, Ontario in 1991. Retained by Eugene Williams in November of 1991 to examine Nichol John and determine whether she was suffering from any emotional or psychiatric disorder that prevented her from consciously recalling her memory of the early morning hours of January 31, 1969.
Frank, Ute	Resident of Regina in 1969 and a witness at a party in a Regina motel room where David Milgaard re-enacted the murder of Gail Miller.
Fraser, Bruce	Chief Crown Prosecutor (Calgary), Alberta Crown Prosecutor's Office between 1992 and 1994 who assisted Neil McCrank in providing legal advice to the RCMP during the "Flicker" investigation.
Gaudette, Barry	Chief Scientist, Molecular Genetics, RCMP Central Forensic Laboratory, Ottawa, Ontario. He provided assistance to federal Justice counsel respecting the possibility of DNA testing in David Milgaard's case.
Gerse, Helen	Lived at 330 Avenue O South in 1969 and found a blood-stained toque at the front of her property shortly after Gail Miller's murder.
Gifford (nee Cadrain), Rita	Albert Cadrain's sister. She lived with the Cadrain family at 334 Avenue O South in 1969 but was not at home on the morning of January 31, 1969 when David Milgaard arrived.
Goa, Elmer	Saskatoon Police Staff Sergeant and Court Officer in 1970 who assisted Ben Wolff, City Prosecutor, and swore the informations relating to Larry Fisher's 1968 and 1970 rape and indecent assault charges.
Gorgchuk, Leonard	A friend of Albert Cadrain in 1969 who was with Albert on the evening of January 30, 1969.
Graham, Bill	Executive Director of the Saskatchewan Police Commission in 1991 who conducted an investigation into the Saskatoon City Police force's retention of files relating to Larry Fisher.
Greenberg, Lawrence	Legal counsel to Larry Fisher in connection with two 1970 Manitoba sexual assaults and the four sexual assaults committed in Saskatoon in 1968 and 1970.
Gunn, Ellen	Director of Public Prosecutions, Saskatchewan Justice between 1987 and December of 1991.

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Name	Role & Description
Hall, Deborah	Witness at a 1969 party in a Regina motel room where David Milgaard re-enacted the murder of Gail Miller. Ms. Hall swore an affidavit in connection with David Milgaard's first application for mercy under s. 690 of the Criminal Code.
Harris, Robert	Witness at a 1969 party in a Regina motel room where David Milgaard re-enacted the murder of Gail Miller.
Harvard, John	Member of Parliament between 1988 and 2004 and an advocate of David Milgaard's cause.
Henderson, Paul	An investigator with Centurion Ministries Inc., a United States non-profit organization that investigates claims of wrongful conviction. He investigated David Milgaard's conviction and Larry Fisher's suspected involvement in Gail Miller's death in the early 1990s.
Hounjet, Rick	At the time of Gail Miller's murder he was eight years old and lived at 227 Avenue N South, Saskatoon. He found a knife handle in his backyard which was subsequently matched to the knife blade found at the Miller crime scene.
Huff, Lorne	He was a member of the Ft. Garry and Winnipeg Police Service between 1961 and 1987. He interviewed Larry Fisher in connection with the sexual assaults on Fisher Victims 5 and 6.
Humen, Anthony	In 1969, he regularly caught the bus at Avenue O and 20th Street in the morning. He was questioned by police respecting his activities on the morning of the murder.
Husulak, John	He drove the Pleasant Hill bus route on January 31, 1969 and provided police with information about a male construction worker with a red hard hat who was not on the bus on the morning of the murder.
Indyk, Marie	Observed two women on 20th Street and Avenue O near St. Mary's church shortly after 7 a.m. on the morning of January 31, 1969.
John, Nichol	David Milgaard's acquaintance and travelling companion on January 31, 1969.
Karp, Carl	Executive producer of news and current affairs for CBC Manitoba around the time of Milgaard's s. 690 applications. In 1991 he and Cecil Rosner co-authored a book entitled "When Justice Fails: The David Milgaard Story".
Karst, Eddie	In 1969 he was a Detective with the Saskatoon Police Service and played an active role in the Miller murder investigation after taking Albert Cadrain's statement on March 2, 1969. He interviewed David Milgaard on March 3, 1969, escorted Ron Wilson to Saskatoon in May of 1969 and took statements from Wilson on May 23 and 24, 1969. In 1970, Detective Karst interviewed Larry Fisher in Fort Garry, Manitoba.

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Name	Role & Description
Kleiv, Thor	In 1969, he was a member of the Identification Unit of the Saskatoon Police. He attended the Miller crime scene and autopsy on January 31, 1969.
Kujawa, Serge	Director of Public Prosecutions, Department of the Attorney General of Saskatchewan (1969 to 1974). Around the same time as David Milgaard's appeal to the Saskatchewan Court of Appeal, Mr. Kujawa was involved in securing a direct indictment against Larry Fisher and prosecuting him for the sexual assaults perpetrated on Fisher Victims 1 to 4.
Kyle, David	Founding member and former Commissioner of the Criminal Cases Review Commission (UK).
Lafreniere, Bruce	He contacted Hersh Wolch in February of 1990 and provided Wolch's office with information respecting Larry Fisher.
Laing, R.D.	Chairman of the Saskatchewan Police Commission in 1991. He wrote a report respecting the Police Commission's investigation into Saskatoon City Police force's retention of files relating to Larry Fisher dated November 29, 1991.
Lamer, (Rt. Hon) Antonio	Chief Justice of the Supreme Court of Canada during the 1992 Reference relating to David Milgaard's second application under s. 690 of the Criminal Code.
Lapchuk, George	Resident of Regina in 1969 and a witness at a party in a Regina motel room where David Milgaard re-enacted the murder of Gail Miller.
Lett, Dan	Journalist and reporter with the Winnipeg Free Press who wrote various newspaper articles on David Milgaard's efforts to obtain his release from prison.
MacFarlane, Bruce	Assistant Deputy Attorney General (Criminal Law) between 1989 and 1993 and actively involved in the consideration of David Milgaard's applications to the federal Minister of Justice under s. 690 of the Criminal Code.
MacKay, Kenneth	In 1971, Mr. MacKay was a Crown Solicitor and agent for the Attorney General for the Province of Saskatchewan.
Mackie, Raymond	In 1969 he was a Detective Sergeant with the Saskatoon Police Service. He was also the lead field investigator and officer in charge of the Miller murder investigation. He took Nichol John's May 24, 1969 statement.
Malanowich, John	In 1969, he was a Youth Sergeant with the Saskatoon Police. He was involved in the Miller murder investigation and took a statement from Sharon Williams, David Milgaard's girlfriend.

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Name	Role & Description
Marcoux, Mary	Lived at 105 Avenue N South, Saskatoon on January 31, 1969. She found Gail Miller's body on her way to school on the morning of January 31, 1969.
Markesteyn, Dr. Peter	Chief Medical Examiner for the Manitoba Department of Justice and Professor of Forensic Medicine at the University of Manitoba in 1990 who provided a report to David Asper in June of 1990 assessing the opinion of Dr. James Ferris and suggesting, among other things, that the yellowish substance collected at the crime scene in 1969 was possibly dog urine.
McCloskey, James	Founder of Centurion Ministries Inc., a United States non-profit organization that investigates claims of wrongful conviction. McCloskey made various public statements regarding David Milgaard's conviction, police conduct and Larry Fisher's responsibility for the Miller murder.
McCorriston, Gerald	Detective with the Saskatoon Police in 1969 and involved in the Miller murder investigation. On February 3, 1969, as part of a general canvass of the area near the crime scene, he interviewed Larry Fisher as a possible witness to unusual activity at the bus stop on Avenue O and 20th Street on the morning of the murder.
McCrank, Neil	Deputy Minister of Justice and Attorney General, Province of Alberta who provided assistance to the RCMP during the "Flicker" investigation. He and Bruce Fraser authored the "Report of Alberta Justice Into Allegations of Criminal Offences Arising From the David Milgaard Case" dated August 15, 1994.
McDonald, Dr. Ian	Dr. McDonald provided a post-arrest psychiatric assessment of David Milgaard in 1969 at the request of T.D.R. Caldwell. In 1972 he provided T.D.R. Caldwell with a diagnostic label of David Milgaard for the use of parole authorities.
McIntyre, (Hon) William R.	Former Justice of the Supreme Court of Canada. Mr. McIntyre was retained by the federal Department of Justice to provide his opinion respecting David Milgaard's first application for mercy under s. 690 of the Criminal Code and consulted by the federal Department of Justice with respect to David Milgaard's second s. 690 application.
McQuhae, Gary	Employed at the Belmont Texaco on 22nd Street and Avenue W in 1969. On the morning of January 31, 1969, he was dispatched on a service call to the 100 Block Avenue T South and gave a boost to Ron Wilson's 1958 Pontiac.
Melnik, Craig	A witness at a 1969 party in a Regina motel room where David Milgaard re-enacted the murder of Gail Miller.
Merchant, Anthony	Legal counsel to David Milgaard and Joyce Milgaard from the spring of 1981 to the fall of 1984.

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Name	Role & Description
Merriman, Margaret	On January 31, 1969, she lived at 226 Avenue N South, Saskatoon (directly across from the entrance to the T-alley between Avenue O and Avenue N). She did not observe any persons or vehicles in the area while looking out her window and waiting for a taxi to arrive between 6:30 a.m. and 6:55 a.m. on the morning of the murder.
Merry, Dr. Colin	Section Head of Haematopathology and Medical Director at the school of Medical Laboratory Technology who provided a report to David Asper in 1990 stating that the possibility could not be excluded that the yellowish substance collected at the crime scene was dog urine.
Milgaard, David	Wrongfully convicted of Gail Miller's murder on January 31, 1970. His conviction was set aside and he was released from prison on April 16, 1992 following the 1992 Supreme Court of Canada Reference into his application for relief under s. 690 of the Criminal Code.
Milgaard, Joyce	David Milgaard's mother.
Miller, Gail	Lived at 130 Avenue O South, Saskatoon and was raped and murdered by Larry Fisher on January 31, 1969.
Mitchell, Robert	Minister of Justice and Attorney General of Saskatchewan between November 1991 and February 1995.
Molchanko, Victor	A Corporal with the RCMP and head of the RCMP Hair and Fibre section of the RCMP Crime Detection Laboratory in Regina in 1969. He examined certain exhibits in connection with Gail Miller's murder.
Murphy, Father	The Priest at St. Mary's Church on 20th Street West, Saskatoon between 1968 and 1973. He encouraged Albert Cadrain to apply for the reward after David Milgaard's trial.
Nordstrum, Hilmer	The officer in charge of the Morality Division of the Saskatoon Police Service in 1969 and 1970. He accompanied Detective Karst to Winnipeg to interview Larry Fisher with respect to sexual assaults committed in Saskatoon in 1968 and 1970.
Nyczai, Adeline	Gail Miller's roommate at 130 Avenue O South. She saw Gail Miller on the morning of January 31, 1969 between 6:35 a.m. and 6:45 a.m.
O'Brien, Chris	Journalist with CHAB radio in Moose Jaw in 1980 and 1981. He interviewed Deborah Hall in 1981.
Oliver, Ian	He was a Constable with the Saskatoon Police Service in 1969 who attended the Miller crime scene with Identification Officer Thor Kliev and located a knife on the stringer of a fence bordering 221 Avenue N South.
Orne, Dr. Martin	Medical Doctor and Professor of Psychiatry at the University of Pennsylvania who was retained by the federal Department of Justice to hypnotize and provide a report on Nichol John in January of 1992.

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Name	Role & Description
Pambrun, Clifford	Linda Fisher's uncle, who worked with and was friends with Larry Fisher.
Parker, John (Jack)	A detective with the Saskatoon Police Service in 1969 who, along with Detective Sergeant Reid, was among the first officers to attend the Miller crime scene on January 31, 1969. In 1980, Inspector Wagner assigned him to follow up and investigate Linda Fisher's August 28, 1980 statement.
Passet, Vernon	A Sergeant in the K-9 section of the Saskatoon Police in the period 1968 to 1970. He attended the Miller crime scene with his dog on January 31, 1969 and also investigated a section of highway with his dog in May of 1969 in search of the compact thrown out of Ron Wilson's vehicle on the way to Alberta.
Patterson, John	Inmate at the Prince Albert Penitentiary who served time with Larry Fisher.
Paynter, Bruce	Staff Sergeant in charge of the Serology Section at the RCMP Crime Detection Laboratory in Regina in 1969. He conducted tests on a number of exhibits related to the Miller murder at the request of the Saskatoon Police.
Pearson, Rick	Sergeant with the RCMP who provided investigative assistance to federal Justice, particularly Eugene Williams, in connection with David Milgaard's two applications for mercy under s. 690 of the Criminal Code in the early 1990s.
Penkala, Joseph	Lieutenant in charge of the Identification Division of the Saskatoon Police Service in 1969. He attended the Miller crime scene and autopsy on January 31, 1969 and was involved in the investigation of Gail Miller's murder thereafter. He subsequently became the Chief of Saskatoon Police Service.
Perry, Bob	Investigator with Robinson Investigations (Regina). In 1992 he was retained by the offices of Wolch, Pinx, Tapper and Scurfield to investigate and interview Michael Breckenridge.
Perry, Dr. Campbell	Professor of Psychology, Concordia University. He was retained by Eugene Williams, federal Department of Justice to review the methodology and assess the results of Dr. Lee Pulos' hypnosis of Nichol John.
Poitras, Arnold	He provided information to Bruce Lafreniere regarding Larry Fisher.
Pulos, Lee	Psychologist retained by Eugene Williams of the federal Department of Justice to hypnotize and conduct an interview of Nichol John in 1991.

Chapter 2 Chronology of Events and Persons Referenced in Report

Name	Role & Description
Quinn, John	Inspector with the Saskatoon City Police in 1990 who provided assistance to Eugene Williams and Sergeant Rick Pearson with respect to David Milgaard's first s. 690 application. In 1991, he was assigned as the officer in charge of locating the missing files relating to Larry Fisher.
Rasmussen, Edwin	In 1969 he was a Corporal with the RCMP and provided investigative assistance to the Saskatoon Police Service in the Miller murder investigation.
Rasmussen, Robert	Manager of the Trav-a-Leer Motel where David Milgaard attended and asked him for directions on January 31, 1969.
Reid, George	A Detective Sergeant with the Saskatoon Police Service in 1969 and was among the first officers to attend the Miller crime scene on January 31, 1969. He was one of the senior officers involved in the Miller murder investigation.
Remenda, Norman	Lived at 224 Avenue N South and was 12 years old in January 1969. He and Giles Beauchamp found Gail Miller's wallet in April of 1969.
Renaud, Roger	In 1968 and 1969 he was a field manager for MacLean Hunter magazines. He hired David Milgaard to work as a magazine salesman in late 1968.
Riddell, J.A.B.	Inspector in charge of the RCMP's Investigation Branch in Regina in 1969 who assisted the Saskatoon Police with the Miller murder investigation, including conducting interviews of Wilson and John in March of 1969. He also attended a meeting on May 16, 1969 with various members of the Saskatoon Police.
Roberts, Art	In 1969 he was an Inspector and polygraph operator with the Calgary Police Service. He came to Saskatoon in May of 1969 at the request of the Saskatoon Police and conducted an interrogation and polygraph of Ron Wilson and an interrogation of Nichol John.
Roberts, David	Journalist and reporter with the Globe and Mail who wrote various newspaper articles on a number of issues relating to David Milgaard's efforts to obtain his release from prison.
Robinson, Michael	Former officer and National Polygraph Coordinator for the RCMP. After retirement from the RCMP, he was a private investigator with Robinson Investigations and attempted to conduct a polygraph test on Larry Fisher in 1990.
Rodin, Greg	Lawyer with the law firm of Wolch, Pinx, Tapper and Scurfield who began assisting Hersh Wolch on the Milgaard file after David Asper left the practise of law in June 1992.

Chapter 2 Chronology of Events and Persons Referenced in Report

Name	Role & Description
Rossmo, D. Kim	Professor of Criminology and retired police officer. In 1991, he and Neil Boyd co-authored a report entitled "Milgaard v. The Queen: Finding Justice - Problems and Process" dated October 1991.
Sargent, Syd	On January 31, 1969 on his way home from work, he was turning onto 20th St. and saw a young woman dressed like a nurse standing down the south side of the block and a man staggering down the street between 7:00 a.m. to 7:05 a.m. At the Inquiry, he identified the woman as Gail Miller.
Sawatsky, Murray	Officer in charge of the RCMP's investigation team assembled in late 1992 to investigate allegations of wrongdoing against members of the Saskatoon City Police and Saskatchewan Department of Justice (i.e., the "Flicker" investigation).
Shannon, Howard	Assistant Manager, Prairie Region, for MacLean-Hunter Magazine in 1969. In 1981, he provided funds to Joyce and David Milgaard to retain Tony Merchant as their legal counsel.
Short, Charles	Lieutenant in charge of the Detectives Division of the Saskatoon Police Service in 1969. He performed a supervisory function in connection with the Gail Miller murder investigation and was involved in interviews of Albert and Dennis Cadrain, Ron Wilson and Nichol John in March of 1969.
Simington, William	Sergeant with the Shellbrook detachment of the RCMP. Bruce Lafreniere claimed that he made a report to officer Simington regarding Larry Fisher and the Miller murder at the Shellbrook detachment of the RCMP in 1986.
Spence, Leslie	Gail Miller's boyfriend in January of 1969.
Stadnyk, Bobbi	An acquaintance of Ron Wilson, George Lapchuk, Craig Melnyk and Launa Edwards.
Tallis, (Hon.) Calvin F.	Former Justice of the Saskatchewan Court of Appeal. He was David Milgaard's defence counsel during his preliminary inquiry, trial and appeal to the Saskatchewan Court of Appeal.
Tisbury, Gary	Sergeant with the RCMP in Nakusp, B.C. who assisted Eugene Williams with witness interviews conducted in British Columbia.
Ulrich, Elmer	The Case Preparation Officer for the Saskatoon Police Service. He was the Case Preparation officer for the Miller murder file.
Valila, Harry	An officer in the Morality Division of the Saskatoon Police in 1969. He assisted with the Miller murder investigation and was aware of some information relating to the sexual assaults perpetrated by Larry Fisher in Saskatoon in 1968 and 1970.

Chapter 2 Chronology of Events and Persons Referenced in Report

Name	Role & Description
Vanin, Thomas	An officer with the Saskatoon City Police who provided internal police information to Hersh Wolch, David Asper, Joyce Milgaard, Paul Henderson and members of the media in the early 1990s.
Wagner, Kenneth	An Inspector with the Saskatoon Police who took Linda Fisher's statement on August 28, 1980.
Walters, Kenneth	In 1969, he was a Constable in the Youth Section of the Criminal Investigations Division of the Regina City Police, and was familiar with Ron Wilson, Nichol John, David Milgaard, George Lapchuk, Craig Melnyk, Ute Frank and Barbara Berard.
Weir, Stanley (Gus)	In 1969 and 1970, he was a Morality Officer with the Saskatoon Police Service. He was also the officer in charge of the Fisher Victim 4 rape investigation.
Williams, Eugene	Lawyer, federal Department of Justice. He was assigned to investigate and assess David Milgaard's applications for mercy under s. 690 of the Criminal Code between 1989 and 1992.
Williams, Sharon	David Milgaard's girlfriend in 1968. She met with David Milgaard and his travelling companions (Ron Wilson, Nichol John and Albert Cadrain) in St. Albert, Alberta on February 1, 1969.
Wilson, Ronald	One of David Milgaard's acquaintances and travelling companions on the trip to Saskatoon and Alberta on January 31, 1969. He testified against David Milgaard at his trial in 1970 and subsequently recanted some of his incriminating testimony in 1990.
Wilson, Shirley	Ron Wilson's mother.
Wilton, David	Constable with the Saskatoon Police in 1969 who assisted in the Gail Miller murder investigation and took a report from Syd Sargent.
Wispinski, Barbara	Nichol John's friend and confidant in 1969.
Wood, John	In 1969, he was the Superintendent of the Criminal Investigations Division of the Saskatoon Police who performed an administrative and oversight function in the Miller murder investigation.
Wright, Bryan	Linda Fisher's former common-law spouse (1975 to 1983). He drove Linda to the police station on August 28, 1980.
Young, Gary	Legal counsel to Joyce and David Milgaard in the early 1980's.

Individuals Mentioned in this Report Whose Names are Protected for Reasons of Privacy

A number of sexual assault victims testified during the Commission's public hearings and I received their testimony subject to a publication ban which barred the media from reporting names and personal information which might identify them. In addition, a number of documents relating to certain assault victims were exhibited before me during the course of the public hearings and, consequently, I ordered that the names of the victims listed in those documents also be subject to a ban on publication.

In order to ensure the continued privacy of these victims, the Commission has ascribed an alpha-numerical identifier and shortened acronym to each that will be used throughout this Report. Victims that were assaulted by Larry Fisher have been given an alpha-numeric identifier that begins with the prefix "Fisher" or "FV". Victims of unknown assailants are simply identified as "Victim" or "V". I will use the full identifier or its shortened acronym interchangeably throughout the Report where the context requires me to do so.

Two charts describing the alpha-numeric identifiers associated with the assault victims and the basic details of their respective assaults are listed below.

Fisher Victims

Fisher Victim Identifier	Date of Assault	Location of Assault
Fisher Victim 1 (FV1)	October 21, 1968	Near 18th Street between Avenues G and H, Saskatoon.
Fisher Victim 2 (FV2)	November 13, 1968	Near 18th Street between Avenues E and F, Saskatoon.
Fisher Victim 3 (FV3)	November 29, 1968	Near Wiggins Avenue and Temperance Street, Saskatoon.
Fisher Victim 4 (FV4)	February 21, 1970	200 Block, Avenue V South, Saskatoon.
Fisher Victim 5 (FV5)	August 2, 1970	Ft. Garry, Manitoba.
Fisher Victim 6 (FV6)	September 19, 1970	Ft. Garry, Manitoba.
Fisher Victim 7 (FV7)	March 31, 1980	North Battleford, Saskatchewan.

Victims of Unknown Assailants

Other Victim Identifier	Date of Assault	Location of Assault
Victim 8 (V8)	May 14, 1968	Bird's Point Resort near Round Lake, Saskatchewan.
Victim 9 (V9)	Late 1968	Back lane of 2018 20th Street, Saskatoon
Victim 10 (V10)	January 15, 1969	100 Block Avenue Q between 21st and 22nd Street, Saskatoon.
Victim 11 (V11)	January 15 or 22, 1969	Near Lindsay Place, Saskatoon.
Victim 12 (V12)	January 31, 1969	Avenue H between 20th and 21st Street, Saskatoon.
Victim 13 (V13)	February 3, 1969	Near 1700 Block 20th Street and Avenue S, Saskatoon.

Chapter 3

Overview of Facts

Part I – Introduction

The Milgaard case has been the subject of two formal reviews by the federal Justice Minister, a reference to the Supreme Court of Canada, an inquiry by the Saskatoon Police Commission concerning missing files relating to Larry Fisher's Saskatoon sexual offences, and a two year RCMP investigation into alleged wrongdoing in the investigation and prosecution of David Milgaard. Finally, Larry Fisher was investigated and successfully prosecuted for the murder of Gail Miller. Except for the Fisher trial, David Milgaard, his mother Joyce, and their supporters either rejected or publicly questioned most of the factual conclusions reached in those proceedings.

I will refer to the Milgaards and their supporters as "the Milgaard group" for the sake of convenience, and not to designate specific individuals beyond the Milgaards themselves, because membership in the group changed from time to time.

The Commission began its work against a background of ill will between the Milgaard group on the one hand and police and government agencies on the other. Resentful of, as they saw it, being left out of previous investigations and doubting official conclusions as being too narrow, misguided, lacking in transparency, biased or simply wrong, the Milgaard group mounted an attack through the media prior to the Inquiry and continued it during the Inquiry.

With little agreement on relevant facts between the Milgaard group and the authorities, the Commission was obliged to rehear evidence. All concerned parties were represented by counsel who had the right to examine witnesses. The Commission does not claim to have answered all concerns, but we have erred on the side of inclusion. No party should be heard to complain that the available evidence was not fully canvassed.

Media coverage of the reopening effort, especially during the period 1989 to 1992, was extensive and relied upon information generated, for the most part, by the Milgaard group. As became apparent during the public hearings, the record thus produced was not always accurate, often inflammatory, and sometimes contradictory. Its constant theme of official wrongdoing caused officials to mistrust all information emanating from the group. The latter's policy of going first to the media with its concerns and only then to official investigators, if at all, alienated authorities. The "media circus",¹ as one member of the Milgaard group described it was, I find, counter-productive to the reopening effort in the long term, although it can be credited with getting Milgaard out of prison and with the quashing of his conviction.

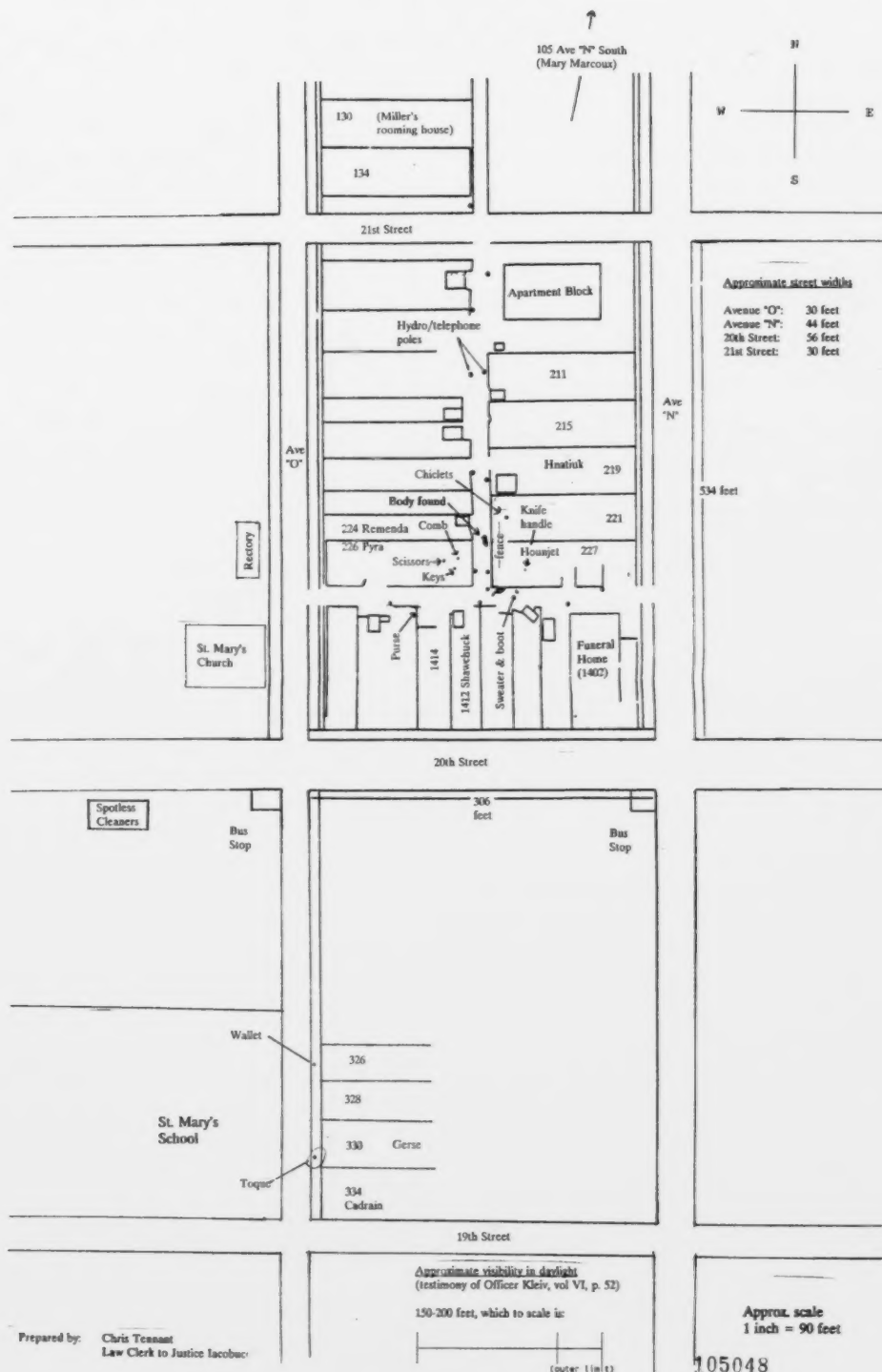
Part II – Investigation of Gail Miller Murder

1. Gail Miller in Saskatoon

Gail Miller moved to Saskatoon, then a city of 129,000 people, in September of 1968. The second of eight children born to Milton and Jean Miller, she trained as a certified nursing assistant in Swift Current. She found employment at City Hospital in Saskatoon where she worked from September 4, 1968 until her death on January 31, 1969. She resided at 130 Avenue O South, a boarding house in the working class district of Pleasant Hill in west Saskatoon. It was here where she was last seen alive at around 6:45 a.m. Her body was found in an alley about a block south of her residence at around 8:30 a.m. She had been sexually assaulted and stabbed to death.

The following map identifies Miller's residence, the location where her body was found, and two bus stops where she could have caught her bus to work. The map also identifies the Cadrain residence where Larry Fisher resided, and where David Milgaard visited on the morning of Miller's murder.

Chapter 3 Overview of Facts



Although nobody saw Miller leave the boarding house, she was thought to have done so around 6:45 a.m. to catch her bus on 20th Street. Her usual route was out the front door, and down Avenue O to the bus stop on the southwest corner of 20th Street and Avenue O, although she had been known to catch the bus a block east of there at Avenue N and 20th Street. Leaving the back door of her residence would have put Miller in the alley leading south to the spot where her body was found. Alternatively, she might have walked south on Avenue N to the 20th Street bus stop.

Gail Miller's body was found face down in the snow in the lane behind 211 Avenue N South, clad in an overcoat with her arms removed from her uniform top which was rolled down to her waist. The fatal stab wounds penetrated her coat but not her uniform. Her blood stained panties, girdle and stockings were down near her left ankle, and her right boot was missing.

A broken paring knife blade was found underneath her body, and the matching maroon handle was later found in a nearby yard.

Her missing boot and a sweater were found buried in the snow nearby. Contents from her purse were found in adjacent backyards and the purse itself was located a few days later in a nearby garbage can.

An autopsy was conducted on the same day at St. Paul's Hospital by pathologist Dr. Harry Emson, with Saskatoon Police officers Lt. Joe Penkala and Thor Kliev of the Identification Division in attendance. The victim had sustained multiple throat slashes and stab wounds to the upper torso, one of which penetrated the lung causing death.

Vaginal contents were tested and found to contain non-motile spermatozoa. They were then discarded.

2. Saskatoon Police

In 1969, the Saskatoon City Police Service was comprised of approximately 250 personnel, of which 203 were active police officers. Jack Wood was the Superintendent of Criminal Investigations. There were three divisions which reported to him: Detectives, Morality and Identification.

Homicide investigations were conducted by the Detective Division which was headed by Lt. Charles Short. There were three detective sergeants, Raymond Mackie, George Reid, and Jack Ward and 17 detectives who investigated homicides as well as other crimes including fraud, robbery and other criminal offences.

At the time, sexual assaults were handled by the Morality Division, which was headed by Inspector Hilmer Nordstrum. There were 12 morality officers.

The Identification Division was headed by Lt. Joseph Penkala and included five identification officers. This Division provided crime scene support to Detectives and Morality.

It was the practice of the Saskatoon Police (a term which I will use to describe the organization variously known over the years as the Saskatoon Police Service, Saskatoon Police Force and the Saskatoon Police Department) to assign major cases to two officers who would share the responsibility of overseeing the investigation. The Gail Miller murder investigation was assigned to Mackie and Reid. All of the other homicide detectives were involved in the investigation, as well as officers and constables from other divisions. In total, more than 100 police officers were involved in the Gail Miller murder investigation.

3. Investigation Before Milgaard Became a Suspect

The Saskatoon Police deployed significant resources to investigate the Miller murder.

A team of police officers undertook a coordinated canvass of the neighbourhood, asking people if they noticed anything unusual on the morning of January 31, 1969. The search covered an approximate six square block radius.

The police interviewed Miller's roommates, family, and friends to try and identify possible suspects, and a motive for the murder. Miller's male acquaintances were investigated as possible suspects and eventually eliminated. The police also interviewed and investigated Miller's fellow employees at the City Hospital to identify anybody suspicious there who may have committed the crime.

The police canvassed the drycleaners in the City to determine whether anybody had brought in bloody clothes. The police received numerous leads and tips about possible suspects. These were followed up, but without success.

Early in the investigation, the Saskatoon Police suspected that Miller's killer was the same person who had committed two rapes and an indecent assault in the three months preceding Miller's murder.

On October 21, 1968, Fisher Victim 1 was sexually assaulted near 18th Street and Avenue G and H in Saskatoon. On November 13, 1968, Fisher Victim 2 was sexually assaulted near 18th Street between Avenues E and F. These assaults occurred approximately eight to 10 blocks from where Miller's body was found. The assaults took place in the early evening. In both assaults, the victims were grabbed by the assailant and taken to a nearby alley where they were directed to remove their clothing. The assailant had a knife in each of the attacks, but the victims were not stabbed. Although these victims were not robbed, stabbed or killed, the police viewed the circumstances of these assaults to be similar to the modus operandi of the Gail Miller rape and murder.

There was a third attempted assault on November 28, 1968. Fisher Victim 3 was indecently assaulted near Wiggins Avenue and Temperance Street in Saskatoon. This assault also took place in the evening shortly after 9:30 p.m. The victim was grabbed by an assailant with a knife and taken to an alley. A car came along before the assailant was able to sexually assault the victim and he escaped.

The circumstances of the 1968 assaults were similar and although the police had not identified any suspects, they believed a single perpetrator committed all three assaults. At the time of the Miller murder, these assaults were unsolved and the police did not have any suspects.

The Saskatoon Police thoroughly investigated the single perpetrator theory. The police investigated people on a list of known sexual deviates. They checked all of the names of previous sexual offenders and eventually eliminated them as suspects for the earlier assaults and Gail Miller's murder.

David Milgaard was unknown to the Saskatoon Police, and was not a suspect until March 2, 1969, when Albert Cadrain walked into the Saskatoon Police station and told the police that he thought his friend, David Milgaard, was responsible for the murder of Gail Miller. By this time, the police had already investigated and eliminated over 160 potential suspects.

4. Larry Fisher

Fisher, who lived in the basement suite of the Cadrain house at 334 Avenue O South, within two blocks of the murder scene, with his wife Linda and their infant daughter Tammy, was not a suspect in the original

police investigation. He had no criminal record and was not suspected of the sexual assaults in the area until well after the Milgaard trial, becoming known to authorities only in September of 1970 in that connection. Arrested at that time in Winnipeg for sexual assaults in that area, he subsequently confessed and plead guilty to three Saskatoon assaults committed in October and November of 1968, and to a fourth committed in Saskatoon in February of 1970.

Police were alerted to look for a construction worker wearing a hard hat who usually caught the bus at Avenue O and 20th Street, but was not on the bus on the morning of the murder. Fisher was one of two people identified in this connection as he stood waiting for his bus, wearing a yellow construction hat. When interviewed on February 3, 1969, he reported having gone to work on the morning of January 31, 1969. He was not interviewed as a suspect but rather as a witness who may have observed something that morning. The second person, Anthony Humen, was interviewed as a suspect having been pointed out by the bus driver as a passenger not on the bus on January 31, 1969.

As part of the neighborhood canvass, Linda Fisher was questioned at home about any unusual observations. She had made none.

5. Forensic Investigation

On February 4, 1969, Penkala returned to the murder scene and found two frozen lumps in the snow, one of which contained human pubic hair. Pathologist, Dr. Harry Emson found them to contain spermatozoa. Staff Sgt. Bruce Paynter of the RCMP lab identified human semen with A antigens in one of the frozen lumps meaning that, presumptively at least, the donor of the semen was of blood type A and a secretor of antigens. Before trial, Milgaard was incorrectly identified presumptively as a type A non-secretor. Only in 1992 was it shown definitively that he was a secretor.

Paynter inspected the victim's clothing, finding human seminal staining on only the panties.

6. Physical Evidence

Police concluded that the knife blade found beneath Gail Miller's body was the murder weapon, and that its handle was the maroon plastic one found in a neighboring yard. No fingerprints could be identified.

On April 4, 1969, Miller's wallet was found on Avenue O South, a couple of doors from the Cadrain house. The next door neighbor found a bloody toque in her yard shortly after the murder, turning it over to police on April 5, 1969. Examination confirmed the presence of blood, but no typing was possible.

7. David Milgaard

David Milgaard, 16 years old at the time of the murder, was the eldest in a family of four, born to Lorne and Joyce Milgaard.

He was a troubled child from the age of about five years and required the intervention of social workers, psychologists, psychiatrists, and authority figures in the school system. He presented a management problem in school and at home, running away in 1966. Milgaard spent a few months in the Yorkton Mental Health Clinic, then in a foster home. In March of 1967, he was admitted to the Saskatchewan Boys School, from which he twice ran. Discharged from school in 1967, he returned home briefly only to leave again travelling to hippie houses in Regina, Edmonton and Vancouver. In January of 1968, Joyce Milgaard brought her son to Yorkton asking for placement. Milgaard was placed in two successive foster homes, leaving the last in the spring of 1968, traveling to eastern Canada and then to Oregon where he

was arrested in August of that year and asked to leave the United States. As a juvenile, he was charged and convicted of a number of offences relating to theft, joy riding and drugs, but none alleging physical or violent behaviour.

(a) David Milgaard's Activities on January 31, 1969

Milgaard gave rather sketchy accounts to police of his activities on January 31, 1969, but did not testify at trial. The most reliable evidence about his whereabouts on that morning came from his defence counsel's memory of what Milgaard had told him.

On the evening of Thursday, January 30, 1969, Milgaard and his friend, Ronald Wilson, decided to travel from Regina to Saskatoon for Vancouver. Their purpose was to buy drugs for personal use and resale. They invited Nichol John, whom Milgaard had met only a few days earlier. They had little money and planned to pick up Milgaard's friend, Albert Cadrain, in Saskatoon with a view to using his money for the trip.

Before leaving Regina in Wilson's car, a 1958 Pontiac in poor condition, Wilson and Milgaard stole a battery, spilling acid on themselves in the process.

They left Regina shortly after midnight, breaking into a grain elevator in Aylesbury along the way where, finding no money, Milgaard stole a flashlight. On the trip to Saskatoon, Wilson and Milgaard discussed rolling people, and purse snatching as a means of funding the trip.

Milgaard, Wilson, John and Cadrain were all frequent users of drugs, including marijuana and LSD.

Wilson and John both testified at trial that they had not taken drugs on the trip to Saskatoon, or while they were there. Milgaard told his trial lawyer, Calvin Tallis, that they had used drugs prior to leaving Regina and after leaving Saskatoon, but not in between. Wilson later said that they were all stoned on the trip, but did not want to admit it to authorities.

Milgaard admitted to Tallis that he had a flexible bladed knife in his possession on the trip to Saskatoon, but that it was neither a paring knife nor a hunting knife as variously described by his companions Wilson and John at trial.

Although the trio's movements after arriving in Saskatoon cannot be traced exactly, a fairly accurate picture emerges from Wilson and John's trial evidence, and from what Milgaard told his lawyer.

Arriving in Saskatoon around 6:30 a.m. with Wilson driving, they crossed the river on the Idylwyld freeway turning west on 20th or 22nd Street in search of Cadrain's house. Only Milgaard had been there and he did not have the address. He knew it was in the Pleasant Hill area near St. Mary's Church, which is located on 20th Street midway between the Cadrain residence and Gail Miller's boarding house, and half a block from where Gail Miller's body was found.

From what his client told him, Tallis concluded the three young people traveled up and down avenues west of the Idylwyld freeway between 20th and 22nd Streets, probably in the area where the body was found. At one point, they pulled their vehicle alongside a woman and asked for directions. Wilson and John testified at trial that the woman was young and wore a dark coat or cape similar to the coat Gail Miller was wearing that morning. Nobody saw her face because of her outerwear. Milgaard told Tallis that she was older, around 35 to 40, and confided that he thought about stealing her purse. This was not known to the police and was one of the reasons that Milgaard did not testify at his trial.

The woman could not help them with directions so they drove on, becoming stuck in the snow either at the intersection of Avenue N and 20th Street, or in the alley behind the funeral home which was on the northwest corner of that intersection. Wilson testified to the first location, and John to the second. Milgaard told his lawyer that they got stuck on one of the avenues between 20th and 22nd Street, leaving Tallis to conclude that it was possibly in the vicinity of Avenues N and O.

Unable to free the stuck vehicle, Wilson and Milgaard left in opposite directions looking for help, with John remaining in the car. Milgaard confirmed as much to Tallis but said he was gone for only a short time. In their first statements to police, John and Wilson did not say anything about the woman they stopped, getting stuck, or that Milgaard had left the car at this time.

Wilson later told the police that Milgaard was away from the car for a short time, and so testified at the preliminary inquiry, increasing the time to 15 minutes in his trial evidence. It was at this time, according to the theory of the Crown, that Milgaard raped and killed Gail Miller, something Milgaard denied to Tallis saying that he met no one when he left the car.

After returning to the car, according to Wilson's testimony and Milgaard's statement to his lawyer, two men in a cream colored Dodge or Chrysler helped to push them out.

The Wilson vehicle was then driven to the Trav-A-Leer Motel, some distance west on 22nd Street, where Milgaard entered in stocking feet asking the front desk manager, Robert Rasmussen, for directions to St. Mary's Church and Cadrain's house. The occupants of the car could not fix the time of their arrival at the motel, but Rasmussen testified at trial that they arrived shortly after opening time at 7:00 a.m., but possibly as late as 7:30 a.m. His evidence was used at trial to identify the window of opportunity open to Milgaard to commit the murder.

Armed with directions, Wilson drove his car towards Cadrain's house, but became stuck in an alley in the 300 block of Avenue T South behind the Danchuk house. Walter and Sandra Danchuk's vehicle had stalled in the alley blocking Wilson's path and he stalled behind their car. The trio went into the house with the Danchuks to wait for a tow truck, and the Danchuks both testified at trial that they did not observe anything unusual about Milgaard and saw no blood on his clothing. Walter Danchuk estimated the time of Wilson's vehicle arrival as between 7:30 a.m. and 7:45 a.m. while Sandra Danchuk had it between 7:40 a.m. and 7:50 a.m. The tow truck came to boost the Wilson vehicle which then was driven to Cadrain's house at around 9:00 a.m.

At home were Cadrain, his five year old brother Kenneth and his 20 year old sister Celine, the latter being in an upstairs bedroom until after Milgaard and Wilson had changed their clothing. Milgaard explained to Tallis that he changed because the crotch of his pants had ripped and the pants had holes from spilled battery acid. He denied that there was blood on his clothes. Albert Cadrain, however, told the police and testified at trial that he saw a blood stain approximately one to two inches in diameter together with a few splatters. It was located on Milgaard's pants and shirttail. He noted no blood on Milgaard's shorts or sweater. Wilson initially told police that he did not see any blood on Milgaard's clothes but later changed his story and testified at trial that he saw blood on Milgaard's pants and shirt. John never did say that she saw blood on his clothes.

While at Cadrain's, Milgaard left the house alone and drove Wilson's car "around the block" a couple of times, as he told police, only to have it stall beside Cadrain's house from where it had to be towed for

transmission repair. Asked by police why he would drive a car around the block in -40 C weather when it had been giving them trouble, Milgaard responded that he "liked to drive".³ The police found such an explanation doubtful on its face and became even more suspicious when Gail Miller's wallet was found in the snow three doors away from the Cadrain house. They thought that he might have been driving back to the murder scene to find out whether the body had been discovered and at the same time had thrown out the wallet.

The Wilson vehicle was towed to a service station for repair. Later in the day Milgaard, Wilson, John and Cadrain left Saskatoon for Edmonton to see Milgaard's girlfriend, Sharon Williams. They made their way to Edmonton via Calgary, having taken a wrong turn.

The operator of the service station who arranged for the extraction of Wilson's car from the alley some time after 9:00 a.m. was suspicious of the three occupants, wondering why people from Regina would be stuck in the alley and how they were able to quickly raise money for a tow after telling the operator that they had none. He reported the incident to the police who ran a license check showing the vehicle registered to Wilson. They took no further action.

Seated in the front of the car on the highway outside of Saskatoon, John found a cosmetic bag in the glove box, and held it up asking whose it was, whereupon Milgaard grabbed it and threw it out the window. She so testified at trial as did Wilson and Cadrain. Milgaard admitted the incident to Tallis but was unable to explain why he did it, or where the cosmetic bag came from. The evidence was incriminating, and having heard what he did from his client, Tallis could not do much to challenge it. Had Milgaard taken the stand at trial, cross-examination on the point was expected to be robust even though Gail Miller's purse which was retrieved from a garbage can near the scene of the crime, contained a cosmetic bag.

They returned to Regina on February 6, 1969, cutting short their planned trip to Vancouver when Wilson learned that his father was ill.

8. Investigation of David Milgaard

(a) Albert Cadrain Attendance at Police Station March 2, 1969

Milgaard came to the attention of the Saskatoon Police on March 2, 1969 through the report of Albert Cadrain. After returning with Milgaard, Wilson and John from the trip, Cadrain was picked up on February 6, 1969 in Regina and charged with vagrancy. Regina Police noticed that he lived in the vicinity of the Miller crime scene and that he had left Saskatoon on the day of the murder. They mentioned that to him but he said that he was not aware of the murder. They took no statement from him nor did they contact Saskatoon Police. Up to then, Cadrain had no knowledge of Gail Miller's murder, having left Saskatoon on the afternoon of the day of her death. But arriving home in Saskatoon on March 1, 1969, Albert was told of the murder by family members. He in turn told them that he saw blood on Milgaard's pants upon his arrival at their house, and that Milgaard was in a hurry to leave. After some discussion, they advised him to report the matter to police if he genuinely thought that Milgaard could be responsible for the murder.

The next day, Cadrain reported to the Saskatoon Police station with his brother Dennis, where he told the desk sergeant that he had information relating to the death of Gail Miller. He was questioned first by

Lt. Charles Short and then by Det. Eddie Karst, who took his statement. From that point, Karst became a major figure in the case.

From Cadrain, police heard that:

- Milgaard arrived at Cadrain's house on the morning of the murder at about 9:05 a.m. Cadrain had not seen him for about a year, and his arrival was unexpected.
- Milgaard brought two friends, Wilson and John, whom Cadrain had never met before.
- One of the first things Milgaard said was that they had to "leave town right away".⁴ Cadrain was asked to go with them, and he agreed to go on the trip.
- Cadrain said Milgaard changed his pants and shirt in the living room in front of everyone. He noticed blood on Milgaard's shirt and pants.
- Cadrain thought Milgaard put the soiled clothes back in his suitcase but he wasn't sure.
- Milgaard took Wilson's car for a drive around the block alone. The car stalled and had to be towed to a service station, where it was fixed.
- Milgaard always seemed in a hurry.
- Milgaard always talked about cleaning the car.
- Milgaard talked about a gun once but Cadrain never saw one, nor did he see any blood or knives in the car.
- Everyone seemed to be afraid of Milgaard all the time.

Their one to two hour questioning of Albert and Dennis Cadrain on March 2, 1969, produced a story which needed further investigation. With the assistance of the RCMP, they learned that Milgaard was in Winnipeg, Wilson was in jail in Regina and John lived in Regina. Karst was then sent to Winnipeg to interview Milgaard, and Inspector J.A.B. Riddell of the Regina RCMP was asked to interview Wilson and John.

(b) March 3, 1969 Interview of David Milgaard

The RCMP took Milgaard into custody in Winnipeg telling him that he was being questioned in connection with the murder of Gail Miller. There he was interviewed by Karst on March 3, 1969 in the presence of Sgt. Thomas (Stan) Edmondson of the RCMP. Although warned by Karst that he was a suspect in the murder of Gail Miller, he was not directly asked whether he was involved. Milgaard was asked to provide his recollection of the morning of January 31, 1969, but at first could not be sure if he had been in Saskatoon that year. He then admitted that he had been in Saskatoon with Wilson and John to see Cadrain a month earlier. He confirmed looking for the Cadrain house in Pleasant Hill and speaking to "an old woman on the street"⁵ asking for directions and then stopping at a motel with a car port to get a map. He could not be specific about times stating that "time doesn't mean anything".⁶ Milgaard related being stuck in an alley near an apartment block and changing his clothes at Cadrain's because of the battery acid. His explanation for being in the alley was "I don't know, I like to drive I guess".⁷ He could not say where his clothes were and a search of his personal possessions was unsuccessful in finding them. His body bore no physical marks or scratches that would indicate a recent struggle.

4	Docid 018501.
5	Docid 006586.
6	Docid 006586.
7	Docid 006586.

Milgaard also told the police that while at Cadrain's he drove Wilson's car around the block. Asked why he would do this after having been stuck already he replied "I like to drive I guess".⁸ He admitted being in a hurry or excited, but said that it was because he was looking forward to seeing his girlfriend in Edmonton.

He also told Karst that he had taken drugs on the trip, that he had received psychiatric treatment in Yorkton at the age of 13, that he was given to snap decisions, and that he was not sure if he had been by himself at any time on the morning of January 31, 1969.

Asked about a record, he related convictions for sexual immorality, trafficking, stolen cars, break and enter, escaping lawful custody, and that he had been deported from the United States.

The interview did not allay Karst's suspicions, and excited his interest because:

- Milgaard's arrival time in Saskatoon coincided with the time of the murder.
- Milgaard could be placed in the vicinity of the murder due to his own admission.
- Milgaard was travelling in back lanes the morning of the murder.
- Milgaard attended at the Cadrain residence which was a block from where Gail Miller's body was found and admitted to being in an excited condition.
- Although Milgaard denied having blood on his clothing, the clothing could not be found or located.
- Milgaard and his travelling companions were under the effect of drugs on the trip.
- Milgaard and his travelling companions were in financial trouble.
- The type of offences and the record of Milgaard's previous behaviour was considered to be significant.
- While Wilson's vehicle was being fixed, Milgaard made various attempts to clean the auto.

Significantly, the police noted that "there is no accounting for the time when Milgaard arrived in the city (approximately 5:00 a.m. or 5:30 a.m. by their own admission) until approximately 20 minutes to 8:00 a.m. when they were stuck in the lane behind Danchuk's house".⁹ They concluded from the Milgaard and Wilson statements that Milgaard "could be responsible for an offence of this type and there are many areas...to be cleared up further regarding the time element and discrepancies in statements before Milgaard could be eliminated as a suspect".¹⁰

(c) Ron Wilson Statement – March 3, 1969

The Wilson statement of March 3, 1969, given to Inspector J.A.B. Riddell must speak for itself because Riddell is deceased and was never asked to provide an account of the interview and statement. The statement exists in typed format with no indication of the nature of the questions asked.

Wilson is recorded as having reported arriving in Saskatoon around 5:00 or 6:00 a.m. and then driving around looking for the Cadrain house. They became stuck in an alley behind a car, got their vehicle started with a boost, found the Cadrain house and entered.

Milgaard went to the car for his suitcase, but drove it around the block and the transmission line broke. Wilson said that he also changed his pants at the Cadrain house because of spilled battery acid.

8 Docid 006586.
9 Docid 009233.
10 Docid 009233.

Police were later to hear from Wilson's mother that he and Milgaard had changed their clothes before leaving Regina because of battery acid on them.

In his statement, Wilson said "at no time during the time we were in Saskatoon was Dave Milgaard out of my sight for more than one or two minutes, the one time being when he drove the car around the block. This would be well after daylight. I never knew Dave to have a knife. I am convinced that Dave Milgaard never left our company during the morning we were in Saskatoon."¹¹ Wilson also stated that "all during this trip there was never any mention about the murder of a girl in Saskatoon. In fact I didn't even know about this murder until the police told me today".¹²

In a note attached to Wilson's statement, Riddell stated that during the interview with Wilson, he "appeared straight forward with nothing to hide".¹³

After interviewing Wilson, the RCMP searched Wilson's car and nothing of interest was located. Milgaard's clothes were not found, nor were any blood stains noted. The police also checked with Wilson's mother who advised that she had Milgaard's brown jacket, but that she had been given permission by Sgt. Kenneth Walters of the Regina Police to throw it out.

(d) Nichol John Statement – March 11, 1969

On March 11, 1969, John told Riddell that the group arrived in Saskatoon between 6:30 a.m. and 7:30 a.m., drove around looking for Cadrain's house, stopped at a motel to get a map, became stuck in a back alley behind a vehicle, leaving there well after daylight and going to the Cadrain house. There Milgaard and Wilson changed clothes, Wilson's pants being eaten by acid and Milgaard having ripped the crotch out of his. She did not see blood on anybody's clothing. She too told of Milgaard driving the car around the block, and that it broke down.

John said that all during the morning they were in Saskatoon, Wilson, John and Milgaard were together and "I am sure that David or Ron never left me for more than one or two minutes that morning."¹⁴

(e) Follow-up Investigation

Cadrain gave a second statement to police on March 5, 1969, mentioning once more the blood on Milgaard's clothing.

Although in their statements Wilson and John were adamant that Milgaard did not leave their sight for more than one or two minutes, the police thought that they might not have been getting the full story for they had, in addition, evidence from the service station operator that Milgaard had been trying to clean out the car. Coupled with Milgaard's past brushes with the law, his lifestyle, his personal history and the evasive nature of his interview, he remained a suspect.

On March 18, 1969, Karst and Short went to Regina to interview Wilson and John, taking Cadrain with them. They got nothing from Wilson, but interviewed John and Cadrain together, hearing from John that she believed Cadrain was telling the truth. In her opinion, Milgaard was a dangerous character and had forced her to have intercourse several times. She was afraid of him. Hearing of Milgaard's trip to Edmonton and St. Albert, Saskatoon Police sent an officer to interview Sharon Williams in St. Albert.

11	Docid 042086.
12	Docid 042086.
13	Docid 042086.
14	Docid 002124.

She was a one-time girlfriend of Milgaard whom he had gone to visit. Nothing was learned in connection with the murder, but Williams painted a highly unfavourable picture of Milgaard, detailing his property related criminal behaviour and his aggressive sexual behaviour towards her. She considered him to be a violent person capable of murder.

Police suspicion was further heightened with the discovery on April 4, 1969, of Gail Miller's wallet buried in the snow near the Cadrain house. They suspected that Milgaard had thrown it there on his drive from the Cadrain house.

The police considered the possibility that Milgaard had committed the three recent sexual assaults as well, but then learned that he was not in Saskatoon on the relevant dates.

Karst and Edmondson went back to John on April 14, 1969, Karst reporting that John was emphatic in stating that she could not recall any time during that morning when Wilson and Milgaard had left the vehicle long enough to commit the offence. She recalled seeing no blood on Milgaard's clothing, although she was of the opinion that he was capable of an offence of this nature and acted strangely in Saskatoon. Karst felt that she was being truthful.

A further source of suspicion for the police resulted from the visit of Karst and Edmondson to Wilson's mother, from whom they learned that Milgaard and Wilson had changed their clothes in Regina because of spilled battery acid before leaving for Saskatoon. This was the reason they gave for changing their clothes in Saskatoon. There was no evidence that they handled the battery after leaving Regina so the police could reasonably conclude that they were lying about the reason for their change of clothes in Saskatoon.

Karst remained open minded commenting in his report of April 18, 1969, about the April 14th interview of John:

Although there are many unanswered questions with regard to Milgaard's activities on that particular morning, if one is to believe the girl, Nichol John, and it appears that she is very convincing with her story, then there is no way in which Milgaard can be connected with this crime.¹⁵

Saskatoon Police interviewed Milgaard on April 18, 1969 and he provided blood, saliva and hair samples. He was found to be blood type A – the same as the donor of the sperm found near Miller's body.

Milgaard was again questioned about driving around the block at Cadrain's and about his clothing. Again he stated that he liked to drive and thought that he had left his old clothes at the Cadrain house. He could not be specific about the times when stopping at the motel, getting stuck behind Danchuks or arriving at the Cadrain house. This time he was asked whether he murdered Gail Miller, or was connected with the murder, and he replied in the negative.

Police found him co-operative, yet vague and evasive.

Six weeks after receiving the incriminating evidence from Cadrain, police were no closer to evidence linking Milgaard to the Miller murder. They continued to test Cadrain's story, noting that in his March 2, 1969 interview he denied knowledge of the murder until he returned home to Saskatoon from Regina. They knew, however, that Regina Police had told him about the murder when they arrested him.

As well, the fact that Miller's wallet was found near Cadrain's residence raised the possibility of Cadrain's involvement.

Cadrain never wavered, however, from his initial statement under repeated questioning. Police tested his blood and that of Wilson (type O and type B), excluding them as suspects.

(f) May 16, 1969 Meeting

Despite investigating over 200 suspects and eliminating most of them, police were not getting anywhere with Wilson and John, but could not eliminate Milgaard. Although co-operative, Milgaard had been evasive with them. Cadrain remained adamant that he saw blood on Milgaard's clothes, and that the latter was in a hurry to leave. They knew that Milgaard and his friends had been in the vicinity of the Miller murder scene at relevant times. They doubted that Wilson and John had given them the full story, and Milgaard's history as described above led them to conclude that he was capable of committing the crime. He could not be eliminated and he could not be charged on the available evidence. He was their best suspect and action needed to be taken to eliminate him or get the necessary evidence to charge him.

Raymond Mackie expressed a number of theories and suggested that "Nichol John, Wilson and Cadrain be brought to Saskatoon where with all present the true story can be obtained even if hypnosis or polygraph are necessary."¹⁶ Mackie went to Short with his material, the investigation file was reviewed and all evidence pointing to Milgaard as a suspect was identified in a four page document. To this was attached Mackie's one page summary and it was given to senior Saskatoon Police officers who met with RCMP officers on May 16, 1969. RCMP, at the request of Saskatoon Police, had rendered full time assistance in the Miller murder investigation up to this point.

An RCMP report of May 21, 1969 of the meeting records agreement that Milgaard was the prime suspect, and that further efforts should be made to either eliminate him or implicate him in the offence. They observed that Wilson and John had stated that Milgaard was never out of their company that morning long enough to commit the offence but it was possible that they were not being truthful, either because they were implicated themselves, or because they feared Milgaard.

The decision was taken to ask Wilson and John for a voluntary polygraph test, something the Saskatoon Police were not equipped to perform. Accordingly, they arranged for it to be done by Inspector Art Roberts of the Calgary Police Service on May 23, 1969.

(g) May 21 to 24, 1969

The period of May 21 to 24, 1969, was critical to the investigation and charging of Milgaard, and it is critical to this Inquiry because it produced evidence which was instrumental in Milgaard's conviction. Both John and Wilson abandoned their earlier assertions that Milgaard had not been away from them long enough to commit the crime, and fleshed out their earlier statements with details which gave the police reasonable and probable grounds to believe that Milgaard was the culprit. Just what caused Wilson and John to turn on their friend is one of the abiding mysteries in this seemingly interminable case.

The following facts appeared from reliable evidence heard at the Inquiry.

On May 20, 1969, Karst and Mackie travelled to Regina to interview John and Wilson and to ask if they would agree to be polygraphed. Both agreed. On May 21, 1969, Wilson was interviewed at the Regina

Chapter 3 Overview of Facts

Police station by Karst and Mackie. Two Regina Police officers were also present. In this interview, Wilson admitted that, contrary to what he said in his March 3, 1969 statement and later interviews, Milgaard had left the vehicle when they became stuck at approximately 6:45 a.m. that morning while looking for the Cadrain residence. Wilson stated that Milgaard appeared to be puffing and running and out of breath when he returned to the vehicle. According to the police report of the interview, Wilson "admitted that he had since thought that this was the time that Milgaard was probably involved in a murder".¹⁷

This new information was significant to the police. Wilson was now telling them that Milgaard was away from Wilson and John in the general area of where Miller's body was found and at the approximate time of the murder. The police had believed that Wilson had not been completely truthful with them and that he had been holding back information. Wilson's new revelation validated the police belief that Wilson knew more than he had been telling them.

Wilson agreed to be polygraphed and Karst drove him back to Saskatoon on May 21, 1969. On the trip, Wilson told Karst that on the January 31st trip to Saskatoon, he and Milgaard discussed doing break and enters and purse snatching as a source of money to finance their trip. Wilson also told Karst that during their trip to Saskatoon Milgaard broke into an elevator office in the town of Aylesbury. Wilson pointed out the elevator to Karst and the police later verified that there had been a break-in in the early morning hours of January 31, 1969.

Upon their arrival in Saskatoon, the police asked Wilson to show them where they travelled on the morning of January 31, 1969. He was not familiar with Saskatoon and was unsure of where they went. Driven around the general area where Miller's body was found, Wilson identified the area around Avenue P & 22nd Street as being familiar. He was able to pick out the Trav-A-Leer Motel as the place where Milgaard went for a map. He also identified the alley behind the Danchuk residence as well as the area of Avenue M, N and P around 22nd Street as being similar to where they had stopped a girl asking for directions. He could not, however, point out the exact location where the car had become stuck or where Milgaard had left the vehicle to go for help.

He was lodged in Saskatoon Police cells overnight, although not arrested. During the morning of May 22, 1969, he was driven around but could not identify further areas where they had been on the morning of January 31, 1969. Corroborating what Milgaard told Calvin Tallis, he said that two men in a 1967 or 1968 cream or yellow Dodge helped them to push their car out of the snow.

Chapter 3 Overview of Facts

Wilson's account of what transpired that morning was recorded by the Police in a report as follows:

FORM #23
SUBJECT: MILL MURDER OCCURRED: E NUMBER 643 /69 *387*
SASKATOON POLICE DEPARTMENT
INVESTIGATION REPORT *73*

NAME OF FIRM OR
PERSON-CONCERNED Gail Miller ADDRESS _____

DIVISION ASSIGNED TO: Detective TIME _____ DATE May 25 /69

FURTHER INVESTIGATION With regards to the Miller Murder file, D/Sgt. Mackie and myself attended in Regina on Tuesday, May 20th, to make further inquiries with regards to this aspect of the file.

PROSECUTION ENTERED Insp. Riddell of the RCMP of that Detachment and Cst. Walters of the City Police in Regina, were interviewed and arrangements made for various appointments and interviews on the following day.

SUBJECTS INVOLVED
OR PROSECUTED:
----- ADULTS
----- JUVENILES

On Wednesday, May 21st, D/Sgt. Mackie and myself and Cst. Walters attended at 1769 Cornsall Street, Regina, which is the Dept. of Welfare where Mickel John's Social Worker was interviewed. Mickel John being a female and will hereafter in this report be referred to by her nickname which is "Mickey".

FILED: The interview was taped for further use, and although the Social Worker interviewed "Mr. Don Robertson", stated there were certain interviews he had had with this girl since he has worked with her, since the time of the alleged offence in Saskatoon, which is of a confidential nature, he is not prepared to divulge to us, he, however, did say that she stated she was not personally involved in a murder.

DATE: A call was later made to 82 Maldren Cres., where Mickey's parents were to be interviewed, however, we could not locate them at this time.

At 2:00 PM, May 21st, Ronald Wilson was interviewed at the Regina City Police Station, The following officers being present, D/Sgt. Mackie, Cst. Walters, and Cst. Eike of the Regina Department, along with myself. This conversation also being taped and presently in my possession.

During this conversation with Ronald Wilson, he admitted attending in Saskatoon with Milgaard and Mickey on the early morning of January 31st and in contradiction to his original and other interviews, he admitted that Milgaard had left the car when they became stuck at approx. 6:45 that morning, while looking for the Cadrian residence. All Wilson would state at this time was that Milgaard appeared to be puffing and running, slightly out of breath when he returned to the vehicle, and he admitted that he had since thought that this was the time that Milgaard was probably involved in a murder.

With this information at hand, I brought Wilson back to Saskatoon while D/Sgt. Mackie stayed in Regina to conduct further inquiries and locate the Mickey referred to in this report, as she no doubt could shed further light on this investigation.

000264

Chapter 3 Overview of Facts

FORM #23

SUBJECT: _____

OCCUR: E NUMBER _____

K-2-388
/69

SASKATOON POLICE DEPARTMENT INVESTIGATION REPORT

72

NAME OF FIRM OR
PERSON CONCERNED _____

ADDRESS _____

DIVISION ASSIGNED TO: _____

TIME _____

DATE _____

/69

- 2 -

FURTHER INVESTIGATION

PROSECUTION ENTERED

SUBJECTS INVOLVED OR PROSECUTED:

ADULTS

JUVENILES

FILED: _____

DATE: _____

En route to Saskatoon, Wilson devolved to me that on that trip on Jan. 31st with Milgaard and Mickey, the two boys had discussed B&E's, along with rolling someone and purse snatching as a source of money, as their financial position at this time was not one with which they could do any amount of travelling, as they anticipated going to Edmonton and Vancouver.

Wilson admitted that Milgaard broke into an elevator office on the road, Mickey nor himself being responsible, however, stated that Milgaard did the actual entering. Consequently, when passing the town of Aylesbury, Wilson pointed out the elevator which Milgaard had broken into. A call was made to the United Grain Growers Elevator Office at this point, Aylesbury, where the agent, George William Trethick, was interviewed, and he admitted that on the night of Jan. 30th, he had had a break in at that point and that he had notified the Craik Detachment of the Mounted Police, Cst. Weaver attending. He also stated that the only thing that he could recall missing was a flashlight but could think of nothing else and when the knife was put to his thought, he did not recall a knife missing from the premises.

When returning to the car and continuing on to Saskatoon, Wilson admitted that Milgaard had returned from the elevator with the flashlight and that this flashlight is presently in his possession at his home at 126 Cornwell Street North, Regina.

He also stated at this time that he could not recall a knife being in the car nor did he see Milgaard bring one from the elevator. On further questioning, he thought that possibly Milgaard could have picked up a knife from the Champs Hotel where they had eaten earlier that day where Mickey had been employed, however, could shed no further light on that aspect.

When entering the Saskatoon City outskirts, Wilson directed me across the overpass and taking the Freeway up as far as Idylwyld where he became unsure of his directions, as to where they had gone after that on that particular morning, however, stated that the area around P and 22nd was familiar and he was able to pick out the Trav-a-lear Motel as the place where Milgaard had entered to obtain a map for directions, this being done in Milgaard's stocking feet, which was verified by the Trav-a-lear Motel Proprietor. Wilson was able to point out the address of 129 Avenue T South when we were in the 100 Block, as the house where they had entered that morning when being stuck the second time, where Milgaard allegedly entered the bathroom.

Wilson pointed out the area of Avenue P and Avenue M and N around 22nd St. West, as an area which is similar to the location where the girl was seen walking on the street that early morning when they approached her to ask directions, however, he was unsure of the exact block. Nor could he point out the exact location where the car had become stalled, where Milgaard had left the vehicle to go for help.

009265

Chapter 3 Overview of Facts

FORM #23

SUBJECT: _____

OCCURR E NUMBER _____

K-3.389
/69

SASKATOON POLICE DEPARTMENT INVESTIGATION REPORT

71

NAME OF FIRM OR
PERSON-CONCERNED _____

ADDRESS _____

DIVISION ASSIGNED TO: _____

TIME _____

DATE _____

/69

FURTHER INVESTIGATION

- 3 -

Wilson was then brought to the Police Station where arrangements were made by Lt. Short for night accommodation for him.

PROSECUTION ENTERED

On the morning of May 22nd, in company with Lt. Short and M/Sgt. Olaysyn, Wilson was again taken to various parts of the City to ascertain if he could point out the various areas where they had been on the morning of Jan. 31st, however, he could add little to the previous information other than when they had been stuck the original time in the vicinity of Ave. M or N that two men in a vehicle described as a 1967-68 green or yellow colored Dodge or Chrysler had come and assisted them in pushing their vehicle out of the snow.

SUBJECTS INVOLVED
OR PROSECUTED:

ADULTS

JUVENILES

FILED: _____

He described these two men as two male persons in their middle 40's in casual dress and one of them wearing glasses. No further description available.

DATE: _____

Wilson's account of what transpired that morning was roughly as follows. The three of them drove into the city and drove around for a short while when they met a girl in the area described above, asked directions for Peace Hill. The asking done by Milgaard who was on the passenger side of the vehicle where the pedestrian was. This girl stated she didn't know and was unable to assist them, however, Milgaard had asked whether she would like a lift or ride to where she was going, to which she declined. Upon driving away, Milgaard had made the remark to the effect, "The stupid bitch". They drove a short distance further and while making a turn, the vehicle became stuck, as they had no reverse gear. At this time Milgaard left for help, returning approx. 15 minutes later puffing and running, however, Wilson states that he saw no blood, etc., or anything on Milgaard at this time. They then drove on around the city a little further where a map was obtained at the Trav-a-leer Motel and they then again got stuck in the lane rear of 129 Avenue T South, where they went into the house, this being verified by Wally Daneshak, who is a resident there. Eventually with the help of a tow truck they got out of there and arrived at the Cadrain residence at 334 Avenue O South at approx. 9:00 AM.

He states this is where Milgaard took the car keys from him and left the house driving around the block for 10 mins., reasons unknown, however, it is felt that this is where Milgaard disposed of the wallet which was found on boulevard at 330 Avenue O South and which had belonged to the Miller girl and also a touque with blood on it being found there which is still be processed at the Lab. This is no other logical explanation for Milgaard leaving that residence at that time after having changed his clothes, which Milgaard when interviewed several weeks prior had stated he had done this because of acid on them, however, this alibi being foiled by Mrs. Wilson who stated he had changed clothes at their residence in Regina before leaving for Saskatoon, after the acid accident.

009266

Chapter 3 Overview of Facts

FORM #23

SUBJECT: _____

OCCURRED AT NUMBER _____

K-4-390

SASKATOON POLICE DEPARTMENT INVESTIGATION REPORT

70

NAME OF FIRM OR
PERSON CONCERNED _____

ADDRESS _____

DIVISION ASSIGNED TO: _____

TIME _____

DATE _____

/97

FURTHER INVESTIGATION

- 4 -

From Cadrian residence, they were towed to the garage at Avenue P and 11th Street where the car was fixed and later that day left Saskatoon for Calgary.

PROSECUTION ENTERED

After this information was obtained, Wilson was brought back to the Police Station and then to the Ritz Hotel where he was left for the night.

SUBJECTS INVOLVED OR PROSECUTED:

ADULTS

JUVENILES

FILED:

DATE:

M/Sgt. Cleary and myself then called at Spillars Cleaners, 20th Street West, where we interviewed Miss Indyk of 1301 Temperance Avenue, who was the person who had seen a young girl come to the steps of the church at Avenue O and 20th St. on the morning of Jan. 31st. At this time Miss Indyk revealed to us that the girl had come to within a foot or two of her looked at her in a strange way, left. This girl had been easily heard talking long before she could be seen, as the cold morning conducted the noise very well in the crisp air, however, she started a short moment later the girl disappeared, another person was observed walking on the opposite (east) side of the street going in a northerly direction. This made her feel very uneasy as she said this person, and in her own words described it "as a ghost" could be seen and not heard, making no noise with his shoes. This is possibly Milgaard walking in stocking feet as he was known to have done that on the morning in question. This being verified by both occupants of the vehicle that he had his shoes off at various times and also verified by Trav-a-Lear Motel operator who recalls Milgaard coming into the Motel that morning in this stocking feet for a nap.

On Friday, May 23rd, I attended at 408 Cavalier Motel in the company with Inspector Wood, Lt. Short, S/Sgt. Mackie, Det. Chertier and Harrison, and at 3:00 PM, I called at room #610 of the Cavalier where Wilson picked out a knife which was out of a group of five, which Sgt. Roberts had shown him as being similar to the one he stated he had seen on route from Regina to Saskatoon on the morning of Jan. 31st, this being a reddish brown colored bone handled type paring knife.

Wilson was then brought to the Police Station and at 3:30 PM, a statement was taken from him with regards to the above described incident adding to the original that he had seen this knife in the car during the trip, which he previously denied. Also added in his statement was that when Milgaard returned to the car after being stuck, the first time, he stated something to the effect that, "I fixed her", and as when Wilson questioned him on this Milgaard declined to make any further comment.

Also in this statement Wilson states he had seen blood on Milgaard's trousers when changing his clothes at the Cadrian residence at 2A Avenue O South on the morning of Jan. 31st, 1969. This he had previously denied.

000267

Chapter 3 Overview of Facts

FORM #23

SUBJECT: _____

OCCUR _____ E NUMBER _____

K-5-391

SASKATOON POLICE DEPARTMENT INVESTIGATION REPORT

69

NAME OF FIRM OR
PERSON CONCERNED _____

ADDRESS _____

DIVISION ASSIGNED TO: _____

TIME _____

DATE _____

/69

FURTHER INVESTIGATION _____

- 5 -

PROSECUTION ENTERED _____

He also states that at Cadriam he noted Milgaard's trousers were ripped around the seat which he had not previously noticed while on this trip. He further adds that on the road to Calgary, when leaving Saskatoon, Micky seemed very nervous and would occasionally scream to which he could offer no explanation at that time but now he feels that this was because of what she knew.

SUBJECTS INVOLVED
OR PROSECUTED: _____

ADULTS _____

JUVENILES _____

Wilson also recalls Micky finding a ladies compact in the vehicle when leaving Saskatoon and when inquiring whose it was Milgaard grabbed it out of her hands and threw it out of the window.

FILED: _____

DATE: _____

This statement goes on to relate that in Calgary Milgaard and himself had gone to the Bus Depot to make a phone call where Milgaard told him about a girl in Saskatoon that he had grabbed and had tried to take her purse, however, she fought, and he had jabbed her with a knife and he had put her purse in a trash can and he had thought she would be alright. Later when Wilson was telling Micky about this incident, she had stated to him that she already knew.

The morning of May 24th, 1969, further interviews were again held with Wilson where he stated he would like to change and add to various parts of his statement given the previous day. This was to the effect that when they originally got to Saskatoon, and had become stuck, Wilson had said to Milgaard, "you go one way for help, I'll go the other", and that when he returned 10 - 15 minutes later Milgaard had not yet returned, however, Micky was still in the car but in a hysterical condition. She had told Wilson that she saw Milgaard drag a girl down the lane and stab her with a knife, shortly after that Milgaard returned to the vehicle and sat beside Micky, however, she shrugged away as she was afraid of the youth, understandably, at that time.

At present D/Sgt. Mackie is in Regina making further inquiries with regards to other investigations along this line, and it should be noted that several other investigations should be conducted at this point with regards to anyone, including the Millar girl's parents being aware of or being able to identify a compact which was found in the car by Micky, also trying to locate this compact, possibly in the ditches on the outskirts of the City, and also as far as to having Mrs. Indyk see Micky in her dark skin colored coat to see whether it is similar and whether the girl is similar to that of the girl which had approached her at the church at Avenue O and 20th Street on the morning in question.

Inquiries have been made in Regina in regards to Milgaard's whereabouts, however, no one had any information to offer with regards to his present employment or residence, in fact, it was revealed to me by the Wilson youth that Milgaard assaulted another girl in Regina and that he was being sought

009268

Chapter 3 Overview of Facts

FORM #23

SUBJECT: _____

OCCURRENCE NUMBER _____

K-6392

/69

68

SASKATOON POLICE DEPARTMENT
INVESTIGATION REPORT

NAME OF FIRM OR
PERSON-CONCERNED _____

ADDRESS _____

DIVISION ASSIGNED TO: _____

TIME _____

DATE _____

/69

FURTHER INVESTIGATION

- 6 -

PROSECUTION ENTERED

by various members of the Criminal Element in that Centre, and if the Police didn't get to Milgaard before they do, they didn't need to worry about him.

SUBJECTS INVOLVED
OR PROSECUTED:

Statement obtained from Mickey by Det./Sgt. Mackie which co-incides with above story related by Wilson.

Investigation continuing.

ADULTS

JUVENILES

E. Karst, Det.

FILED: _____

DATE: _____

000269

It is necessary to bear in mind that our re-examination of evidence the police had gathered is not meant to either prove or disprove facts. Our objective, rather, is to assess the reasonableness of actions the police took in response to what they were hearing.

It is noteworthy that Wilson had begun to incriminate Milgaard before he ever met Art Roberts. The same may be said for John who was picked up in Regina on May 22, 1969, and brought back to Saskatoon by Mackie. She was asked to identify the route travelled by them on the morning of January 31, 1969. She was transported to 20th Street West where she was driven around the area where Miller's body was found. She told police she recalled the brick wall on the east side of the Westwood Funeral Chapel, located on the corner of Avenue N and 20th Street, as being close to where their vehicle had been stuck. She also recalled seeing two garbage cans close to where they were stuck. She pointed out the garbage cans in the alley behind the funeral home as being familiar. These were the same garbage cans where Gail Miller's purse was found. She also recalled seeing a church but could not remember exactly where the church fit in. She was able to identify the service station where they took the car as well as the Danchuk residence. John was driven back to the rear of the funeral home and she indicated that the entrance to the alley was approximately where they had been as she recalled the side of their car being up against the snow bank near the alley.

Saskatoon Police, I find, would have been justified in concluding from the evidence of these two witnesses that they and Milgaard were in the area of the crime at relevant times. Wilson had given them additional information to that provided in his March 3, 1969 statement, such as discussing with Milgaard the idea of rolling someone and stealing a purse for money. He had not told them at first about the break-in at the elevator, nor that their vehicle had become stuck near an alley and that Milgaard left it for about 15 minutes around 6:45 a.m. As well, he told them about stopping a woman for directions – a woman who fit the description of Gail Miller. But the police believed that the two knew more than they were saying and on May 23, 1969, they brought Wilson and John to the Sheraton Cavalier in Saskatoon to be polygraphed by Roberts, having briefed him the night before.

As Roberts confirmed to the Supreme Court of Canada, he went into the interview believing that Milgaard was Miller's killer and that Wilson and John were holding back information that would implicate him.

Without question, Roberts was much more than a trained technician. He was a senior detective and an experienced interrogator. It is arguable that the Saskatoon Police briefing had left him in a less than objective frame of mind, but it is important to me to realize that the Supreme Court judges did not express any adverse findings against him on that account. It is commonplace for investigators to confront a suspect with their belief in his guilt and if that is not improper, it should not be so for an interrogator to suggest to a witness that he is not being truthful or is not telling everything he knows. So far as I am able to determine, that is what happened here, with the result that both Wilson and John added a great deal to what they had said before. Whether it was the truth or not, it seemed reasonable to the police, who told us that they relied upon Roberts' expertise.

I heard no evidence to suggest that Saskatoon Police should have been on the lookout for the use of coercion by Roberts, or that they suggested or participated in any such thing. That Roberts did not prepare a report of his interviews or take any notes or produce polygraph charts or a list of questions that he put to Wilson is of more concern to us than it would have been to Saskatoon Police, whose main interest lay in what the two witnesses told them.

The more incriminating statement of the two was that of John, who related having seen Milgaard stab the victim. She did not repeat this at the preliminary inquiry or the trial and has not done so subsequently.

At trial she said that she could not remember. But the parts that she could remember supported, in some measure, the new incriminating evidence that Wilson gave to Roberts:

- He identified a maroon handled paring knife as being a knife similar to what Milgaard had in his possession on the trip from Regina to Saskatoon.
- He said that after Milgaard returned to the car from being stuck he stated something to the effect that "I fixed her".¹⁸
- He said he saw blood on Milgaard's trousers when Milgaard was changing clothes at Cadrains.
- On the trip to Calgary, John was very nervous and occasionally screamed.
- John found a lady's compact in the vehicle and when she asked who it belonged to, Milgaard grabbed it and threw it out the window.
- Wilson said that Milgaard told him in Calgary that he had grabbed a girl in Saskatoon and had tried to take her purse, however, she fought, and he had jabbed her with a knife and had put her purse in a trash can and he had thought she would be alright.

Roberts, after receiving this information, turned Wilson over to Karst but at some point, it appears, Wilson and John were left together and in the course of their conversation Wilson said "let's sink him".¹⁹ This could be interpreted as a resolve by the two young people to falsely implicate Milgaard or, on the other hand, to implicate him by telling what they knew.

Wilson gave a second statement to Karst the following morning, adding that when Milgaard left the vehicle, Wilson also left the vehicle to look for help, and that when he returned to the car, John was "almost hysterical".²⁰ Wilson asked her what was wrong and she told Wilson that she saw Milgaard carry and drag a girl down the lane and bring out a knife and stab her a few times. Milgaard came back to the car and sat beside John and she moved away from him.

John's 10 page written statement was given to Raymond Mackie on the same morning. It must speak for itself because Mackie did not record the circumstances under which it was given nor could John remember them. The statement provided the following new incriminating evidence against Milgaard:

- On the trip from Regina to Saskatoon, Milgaard had broken into an elevator at Aylesbury and returned with a stolen flashlight.
- Shortly after Milgaard returned to the vehicle, John saw a knife. She couldn't say if it came from the elevator but she didn't see it prior to the break-in. She described the knife as a kitchen knife with a maroon handle and the same as the murder weapon.
- On the way to Saskatoon, Milgaard spoke of wanting to snatch a purse.
- After arriving in Saskatoon, they drove around looking for Cadrain's house and stopped to talk to a girl in the same area where Mackie had driven John (around the funeral home). Milgaard asked the girl for directions and offered a ride which the girl refused. Milgaard then called her a stupid bitch.
- After they drove away, about half a block, the vehicle got stuck at the entrance to the alley behind the funeral home. Wilson and Milgaard got out to try and push but couldn't get the vehicle out. Milgaard and Wilson went for help with Milgaard going in the direction from where they had spoken to the girl and Wilson going the other way.

18. toid 002242.
19. 5568.
20. toid 002242.

- The next recollection John has is seeing Milgaard in the alley on the right side of the car holding the same girl they had spoken to a minute before. She saw him grab her purse and Milgaard reach into one of his pockets and pull out the knife in his right hand. She saw him stabbing the girl with the knife and Milgaard taking her around the corner of the alley.
- John then ran in the direction Wilson had gone and recalls running down the street but not seeing anyone. Her next recollection is sitting in the car again but she did not know how she got back there. She "seemed to recall"²¹ seeing Milgaard putting a purse into a garbage can although she didn't remember what time it was or where she was when she saw this. She then recalled Milgaard returning to the car, sitting beside her. She moved over because she didn't want to be near him. She did not recall talking to Wilson before Milgaard got back and did not recall Milgaard saying anything.
- She described the trip in Danchuk's back alley. She did not recall seeing blood on Milgaard's clothing or seeing the knife again.
- Half way between Saskatoon and Rosetown, John looked in the glove compartment of Wilson's car for a map and found a cosmetic case which she opened up. There was a compact, lipstick and eyeshadow. She asked whose it was. Nobody knew and Milgaard grabbed it and threw it out the window. She also described Milgaard's driving at the time as being very fast.
- In Calgary, when Wilson and John were alone, Wilson told her that Milgaard had killed a girl in Saskatoon and John replied "I know".²² Nothing further was said about the murder.
- John said she had not told anyone about witnessing the murder and didn't recall actually witnessing a murder until the day before when she talked with Roberts. She stated, however, that she was aware that she was somehow involved.
- Miller's black coat that Roberts showed her on May 23, 1969, is identical to the one worn by the girl they spoke to and Milgaard attacked.

The statements given by John and Wilson were sworn before a Justice of the Peace and witnessed by Karst (in the case of Wilson) and Mackie (in the case of John).

Chapter 3 Overview of Facts

(h) Ron Wilson and Nichol John Statements

The statements of Wilson and John are reproduced below:

11-20-93 93-1¹⁷
 - 11-20-93 - 11-20-93 (2)

Name Ronald Dale Wilson Occurrence No. 641/69
 Address 126 Cornwall St. North Place Academy
Rexburg Date May 23-69
 D.O.B. Aug 10-1951 Time 6:50 PM

Ron Wilson Statement

With regards to the statement I gave Inspector Riddell in Rexburg I now have a few things to add & change. On the way from Rexburg to Academy we stopped at a building where Delgama had an office. I think he stole a flashlight which I have at home.

Also today Mr. Roberts showed me 5 small boxes at the Carlson Hotel and I picked out a brown box which he said I had seen Delgama with. Somewhere between Rexburg and Academy. He may have got this brief from the Cheaps Hotel where we ate that day. I don't know just where I saw this brief on him but I remember it was late at night.

Also when we got to Academy I was looking for a building we got stuck earlier trying to make a left turn just after we had a stop to a young lady in a dark coat about there then.

There was in the area where the police showed me the all night stop.

Witness
E. Karab

006701

Signature
Ron Wilson

93¹⁷₋₂

Name Ronela Del Vilan Occurrence No. _____
 Address _____ Place _____
 Date _____ AM
 Time _____ PM

She said she didn't know where Paris Hall was & when we left Zolgens said she was a therapy bitch. She had been walking on the passenger side & Zolgens was the only one that spoke to her.

I should also mention that on the way to Bush store we discussed pulling D.C.'s, selling someone a gun & something for money. I don't really remember if the girl was carrying a gun.

Dave & I got out to push when we got stuck but we couldn't get out. Dave said he'd go for help & he left & disappeared behind the car. About 15 minutes later Dave came back, his car was empty & he was alone. George got into the car. He said something to the effect that "I got to" or "I have to". I said "You what?" and that ended the conversation. I don't remember if Dave had his car on or off when he left the car. I don't remember if we got out, if it was before or after Dave came back to the car that I am in a cream colored dodge or elysha pushed me out.

Witness
E. Karol

006702

Signed:

[Signature]

TESTIMONY

16

93.

Name Ronald Wilson

Occurrence No. _____

Address _____

Place _____

Date _____

AM

Time _____

PM

by hand. I think we were stuck then about 6:15. We eventually got to Cedron about 9:00. After we drove around, got a map of a hotel where Dave led his sheep off, got stuck in a hole.

At Cedron I changed my pants because of acid on them. Dave also changed his clothes. When he went out to get his suitcase I noticed blood on the front of his pants at Cedron, I also noticed they were ripped up the rear.

On the way to Colgang Billy found a white or cream colored compact with flower design, he not just saw about the color. He found this something on the car. He asked Dave who's it was and I don't know what he said, he just took it & threw it out the window. I remember on the road to Colgang Billy would scream every now & then, I don't know what was the matter with him.

At Colgang we went to the bus depot & that is Dave & I. Billy & Shirley stayed behind.

Witness:

006703

Signed:



STATEMENT

15
93.4

Name Ronda Wilson Occurrence No. _____
Address _____ Place _____
Date _____ AM
Time _____ PM

in the car. We went 8 miles a few
phone calls for a girl I knew - Heather Beaton.
who I could not find. This is when Dave
told me he hit a girl a basketball, or
maybe he said he did a girl in a basketball.

I don't remember for sure whether he told
me he grabbed the gun & she fought &
he said he jolted her with a knife a few
times & said he put her gun in a trash
can. He said he thought she'd be alright.

A little later in Calgary when Ricky & I were
together I told her what Dave had told
me & she said she already knew. I don't
know when he told her. We talked about
ditching Dave but we were afraid of him so
we didn't do it.

Other than that & pages I said it's of pretty
different than before. I might also add that
I am sure he's a killer that runs, that's right.

Sworn before me this 23rd day of May,
A.D. 1969 at Saskatoon, Saskatchewan.

(P.L. HURD) A JUSTICE OF THE PEACE
IN AND FOR THE PROVINCE OF SASKATCHEWAN.

Ronda Wilson

Witness:

006704

Signed [Signature]

WITNESS STATEMENT

14
93.5

Name Ronala Dele Wilson Occurrence No. 641/69
Address 126 Barrowall St. Regina Place Saskatoon
Date May 24/69
Time 9⁰⁰ AM

Ronala Wilson States:

I would like to add further account to what I said yesterday in my sworn statement. When Dave & I got out to push the first time we were stuck we couldn't push the car so I said to Dave "You go one way for help & I'll go the other". I went to the corner on the driver's side of the car & walked down the block. I couldn't find help so I went back to the car the same way I had left. The car was still stuck. Ricky was waiting in the car almost hysterical. I asked her what was wrong & she told me she saw Dave carry a drag a girl down the lane & bring out the knife & stab her a few times. Then she broke down again. Dave came back to the car from the back & I got in beside Ricky. He shrugged away from her. The rest is the same as I told you in the other statement. I can't do E. Karel.

Witness

006705

Signature

[Handwritten Signature]

13
93.6

STATEMENT

Name Ronald Wilson Occurrence No. _____
 Address _____ Place _____
 Date _____ AM
 Time _____ PM

Helped us out. This was about a 1967-8
 Dodge or Chrysler, cream or yellow car.
 The 2 men were about in their middle
 forties & were casually dressed, one was
 glasses.

Our car was a 1958 Pontiac,
 light green body & head is grey.
 The center piece on the rear fenders
 is white, some tail light reflector
 lens were broken.

[Signature]

[Signature: E. Korb]

Sworn before me this 24th day of May,

A.D. 1969, at Saskatoon, Saskatchewan

[Signature]

DR. R. TAYLOR) JUSTICE OF THE PEACE
 IN AND FOR SASKATCHEWAN

006706

Witness:

Signal: *[Signature]*

69

Name Nichol John 16 yrs Occurrence No. 641/69
 Address 817 Victoria Ave. Place Saskatoon
Regina Date Friday 24/69
 Time 10⁰⁰ PM

On January 31 1969 I left Regina for Saskatoon with Ron Wilson and Dave Milgaard. We left Regina about 1⁰⁰ PM in Ron Wilson's car.

On the way to Saskatoon we stopped at Caylabury Saskatchewan where Dave Milgaard took into an elevator. I do not recall the name on the elevator. When Dave returned from the elevator he had a flashlight. Shortly after Dave got back into the car I saw a knife he had. I do not know if the knife came from the elevator or not. I am sure I never saw the knife prior to the breakin at the elevator.

This knife was a kitchen knife used to peel potatoes and things like that. It had a ^{wooden} handle. This knife was the same as one of a group of knives that

Witness
 Farmackie

Signed:

Nichol John

125195

Name Nichol John Occurrence No. 64,68
 Address _____ Place _____
 Date _____
 Time 2 PM

I was shown by Mr. Roberts.
 On the way to Saskatoon Dave spoke of wanting to snatch a nurse. I didn't like the idea of the G&E or the snatching the nurse bit.

After we left Aylsbury we got stuck in another town on the way to Saskatoon. I'm pretty sure that it was Quin.

After we got to Saskatoon we drove around for about 10 or 15 minutes. Then we talked to this girl. This was in the area where Sgt. Mackie drove me around.

Ken was driving the car at this time. He drove to the curb when Dave spoke to this girl.

Dave was on the outside passenger side of the front seat. Dave opened the door to talk to this girl as she approached along the sidewalk.

[Signature]

Signed: Nichol John 125196

Name Michael John 6700
 Address _____
 City _____
 State _____
 Zip _____

Dave asked this girl for directions to either down town or Pleasant Hill. He offered to give her a ride to wherever she was going. She refused the ride.

Dave closed the door and said "The stupid bitch".

We started to drive away and only went about half a block when we got stuck. We ended up stuck at the entrance to the alley behind the funeral home.

Now and Dave got out and they tried to push the car. They couldn't get it out.

I recall Dave going back in the direction we had spoke to the girl then went the other way past the funeral home.

The last thing I recall is seeing Dave in the alley on the right side of the car. He had a hold of the same girl we spoke

Michael John

Typed: *Michael John*

125187

Name Nichol John Occurrence No. 641
 address _____ Place _____
 Date _____ AM
 Time _____ PM

to a minute before. I saw him grab her purse. I saw her grab for her purse again. Dave reached into one of his pockets and pulled out the knife. I don't know which pocket he got the knife from. The knife was in his right hand.

I don't know if Dave had a hold of this girl or not at this time. All I recall seeing is him stabbing her with the knife.

The next I recall is him taking her around the corner of the alley. I think I ran after that.

I think I ran in the direction Ben had gone. I recall running down the street. I don't recall seeing anyone. The next thing I knew I was sitting in the car again. I don't know how I got back to the car.

I seem to recall seeing Dave putting a purse into a garbage

Nichol John
 125198

Signed: Nichol John

125198

6544.

Name Nichol John Occurrence No. 641
Address _____ Place _____
5 Date _____ AM
Time _____ PM

can. I don't remember which
time it was or where I was when
I saw this.

I recall there were two Garbage
cans. The one on the left had
the lid tipped. I don't recall
which one he put it in.

The next I remember is sitting
in the car. I don't remember Ken
being in the car or coming back.

I remember Dave coming back
and getting into the front seat
of the car. I remember moving
over toward the drivers side because
I didn't want to be near him.

I don't remember talking to
Ken before Dave got back. I do
not recall Dave saying anything.

The next thing I recall is
when we were driving down an
alley behind some apartment blocks
when we turned left into another
alley and got stuck behind a

Nichol
Witness:

Signed: Nichol John

125199

6494

Name Nichol John Occurrence No. 641
 Address _____ Place _____
 Date 6 _____ AM
 _____ PM

convertable. We were not stuck in the snow but the engine had stalled as a result of trying to push the convertable out.

Shortly after this we got to Albert Cadman's house.

I do not recall seeing blood on Al Dave's cloths or seeing the knife again.

Right after we got to Albert Cadman's house Dave changed cloths.

He changed his pants and shirt. Dave's trousers were ripped up the rear. I don't recall the shirt being torn. I did not see blood on his cloths or hands.

Shortly after Dave took the car for a drive. I don't know if he got the keys from Ken or if he had them. Dave was gone 10 to 15 minutes when he came back. He said he had driven around the block. I don't know

Nichol John
 125200

Signed: *Nichol John*

125200

6394;

Name Nichol John Occurrence No. 641
address _____ Place _____
Date 7 _____ AM
Time _____ PM

if he took anything out to the car or not. The car had apparently brake down at the corner. He told Ron about it and Dave phoned a tow truck. Albert, Ron, Dave & I went with the tow truck to the service station where the car was fixed. This was a Texaco service station. We then went to an all night cafe across the street where we had something to eat. After we ate we went back where our car was.

Dave kept going to the car and the people at the service station kept putting him out of the shop.

Dave never said why he did this. I never saw him take anything from the car.

After the car was fixed while the car was being fixed I had gone to the cafe for a coffee. I was sitting alone when

Ronackie
Witness:

Signed: *Nichol John*

125201

6214

Name Nichol John Occurrence No. 641
 Address _____ Place _____
 Date _____ AM
 Time _____ PM

Albert came over. After the coffee I went with Albert to the bank where he got some money. We then went to a store variety store where he got some things & went back to the service station.

After the car was fixed we all went to one of Albert's friends.

After this we left for Calgary.

On the our way about half way between Saskatoon & Regina

I looked in the glove compartment for a map. I saw a cosmetic case which I opened up. There

was a compact, 2 lipstick and an eye shadow in it. I asked where

it was. Nobody knew where it was. Then Dave grabbed it and threw it

out the window. Dave was driving at this time. He was supposed to

stop because he was driving too fast. Ken didn't like it and we were all

getting scared.

Nichol John
 Witness:

Signed: *Nichol John*

125202

Name Nichol John Occurrence No. 641 ⁶¹⁷
Address _____ Place _____
Date _____ AM
Time _____ PM

9
when we got to Rosetown
we went to the store and bought
some groceries and a knife. Ron
drove from Rosetown.

From Rosetown we went to
Calgary, Edmonton, Calgary, Banff
& back to Regina.

The ~~first~~ second time in Calgary we
got some marijuana which we all
smoked. We all got high. Later
in the night of the same day
Ron, Albert & Dave smoke grass
again and get real high. Ron
was driving crazy with the car
and I told him to pull over. He
did and I took the keys and ran
about a block & then walked a block.

As I stopped I saw Ron following
me. We sat on the steps
inside an apartment block. Here
Ron told me Dave had killed
a girl in Saskatoon. I told him
"I know". I do not recall anything

M. Mackie
Witness:

Signed: Nichol John

125203

Name Nichol John Occurrence No. 641
 Address _____ Place _____
 Date _____ AM
 Time _____ PM

further being said about this murder.

I have not told anyone about witnessing this murder. I didn't recall actually witnessing a murder until yesterday when I talked with Mr. Roberts. I was aware that however that I was somehow involved.

On May 23 Mr. Roberts showed me a coat. This coat as I recall is identical to one worn by the girl we spoke to and Dave attacked.

The cosmetic case Dave threw away was about 4 inches high and 6 inches long. It had a zipper on top. I do not recall the color. It was dirty inside with face makeup.

At the time of this attack Dave was wearing Green and yellow striped pants, Brown suede jacket with knit cuffs & knit insert across chest. Black snow boots, long green

Witness: *Nichol John*

Signal: Nichol John

125204

Name Michael John Occurrence No. 641
 Address _____ Place _____
 Date _____ AM
 Time _____ PM

took with other colors possible Red and Blue. I think I would know this took if I saw it again. Ron's Brother has another like it. The mitts matched the took.

I do not recall seeing these cloths again. I thought he left the pants at Albert's place but I am not sure. I never saw them again anyway.

*Read by Officer
 Completed + Read.
 11:55 AM.*

Michael John

Sworn before me this 24th day of May,
 A.D. 1969, at Saskatoon, Saskatchewan.

K. K. Taylor
 J. K. TAYLOR, JUSTICE OF THE PEACE
 IN AND FOR SASKATCHEWAN.

Witness:

Signed:

125205

Chapter 3 Overview of Facts

Put at its simplest, Saskatoon Police believed that Roberts had gotten the whole truth from Wilson and John.

The Milgaard group claims the evidence was the product of coercive tactics by police, saying there is no other explanation. The argument rests upon the basic premise of Milgaard advocacy since the 1997 DNA typing results which they believe established his factual innocence, something which the Government of Saskatchewan acknowledged at the start of this public inquiry.

Given the acknowledgment by Saskatchewan, this Commission has accepted that David Milgaard was wrongfully convicted, having been found guilty of a crime which he did not commit. In view of that, it cannot be left open as a possibility that John told Roberts the truth when she said that she saw Milgaard stabbing the victim. She either lied, or was mistaken. On the available evidence, as will become apparent, the second alternative is the most plausible. Wilson, experience has shown, needs no particular reason to be untruthful.

Roberts testified at the Supreme Court of Canada that he did nothing improper. Briefly, he said that he tested Wilson's responses to preliminary questions with the polygraph and found them untruthful. Confronted with this, Wilson implicated Milgaard. Roberts did not test the implicating evidence on the polygraph but rather turned him over to the Saskatoon Police who took his statement.

Before attempting a polygraph test on John, Roberts showed her the victim's bloody clothing, appealing to her sympathy by asking "what if this had been your sister?" John then implicated Milgaard, obviating the need for a polygraph exam. Roberts turned her over to Saskatoon Police who kept her overnight and then took her written statement the next day.

On the face of this, there was nothing objectionable. The Supreme Court heard it all and still found no misconduct proven on the part of the police.

What concerns people to this day, including the Commission, is that Roberts made no written report to the Saskatoon Police, kept no notes (if he made any) and did not preserve the polygraph tracings. When Tallis tried to interview him before trial, he was uncooperative to the point that Tallis thought it would be a grave error to call him.

Saskatoon Police kept written records of their handling of these witnesses up to the time of delivering them to Roberts, and they made written reports of what transpired after the witnesses were returned to their custody (except for Mackie's taking of John's statement). But there is nothing in between, and in the view of the Milgaard group, this goes beyond suspicion and invites the inference that undue influence was used.

That inference does not necessarily follow. Roberts is dead. He swore before five judges of the Supreme Court of Canada that he had done nothing wrong. Wolch had the opportunity which is denied to us, of cross-examining him at the Supreme Court but got nowhere, even though a close reading of the transcript invites the conclusion that Roberts' memory of the event, some 23 years before, was unreliable.

If Roberts used improper tactics, or if the Saskatoon Police were a party to them, both the memory of Roberts and the reputation of the police would suffer well deserved opprobrium. There is some evidence to the contrary. John has said more than once that she was not coerced by the police. Wilson only began to say he was coerced when he gave a recantation in 1990 which authorities did not believe, and which I do not believe. John, whose statement was the most damning, had all night to think about it and repent of it, but nevertheless made her incriminating statement under oath the next day. If she had been coerced

Chapter 3 Overview of Facts

by Roberts, it would lift a great weight from her shoulders to have said so long ago, especially at the Inquiry. But she did not.

It is much more likely, in my view, that Roberts had formed the opinion (as he has said), from speaking with Saskatoon Police, that Milgaard was guilty. He went into the interrogation and polygraph session determined to get the truth out of Wilson and John and proceeded as he described to the Supreme Court. We have reliable evidence that John was very tired when seen at the Danchuks not long after the murder. She and her companions might well have been using drugs both before they left Regina and during the trip to Saskatoon. The car in which she sat was stuck in an alley in darkness and fog. What she told Roberts she saw might have been no more than a reconstruction in her mind – a mistake, or even a lie concocted by her and Wilson in response to the pressure of Roberts' questioning. I lack evidence that he resorted to outright coercion, but whatever he said to John did not produce the truth he was seeking. He thought he was getting the truth and he turned her over to Mackie who took her statement the next day.

To the Milgaard group, Wilson's progression from exculpating David Milgaard in his first statement of March 3, 1969, to becoming co-operative with police and giving them some incriminating evidence, to adding more of the same under questioning by Roberts, bespeaks a progressive wearing down under police pressure. For example, although he did not mention the Milgaard admission in Calgary to Saskatoon Police, he told Roberts about it the next day. Despite being asked by Saskatoon Police, Wilson told them he did not see a knife on Milgaard nor any blood on his clothes. Yet the next day he told Roberts that he had.

From the police and prosecution point of view, he was both changing and improving his evidence as he went along. It is equally apparent that the police expected him to because they thought that from March 3, 1969, he was not giving them all he knew.

The second statement given by Wilson to Eddie Karst on May 24, 1969, was even more incriminating than the one he had given the day before. Am I to conclude that Karst improperly induced him to make it? Surely not. The overwhelming and, indeed, undisputed evidence at the Inquiry was that Karst was a highly experienced, honest and skilled investigator. Wilson's history is replete with examples of his inclination to respond affirmatively to whatever the questioner seems to want him to say, and that tendency might well explain why he said what he did to Roberts and then to Karst. He did it at the Supreme Court in 1992 and he did it at this Inquiry. He said one thing to Saskatoon Police and another to Roberts. He made a statement exculpating Milgaard on March 3, 1969, and then two more inculpating him on May 23 and May 24, 1969, essentially repeating those statements at the preliminary inquiry and trial of Milgaard, only to renounce what he had said in giving a statement to Henderson in 1990. But much of this is hindsight. In 1969, the essence of what police and prosecution knew about Wilson was that they had to be cautious with him, but that he finally gave them a story which might reasonably be true. Prosecutor T.D.R. Caldwell put him on the stand on that basis and he gave his evidence in conformity with the May 23 and May 24, 1969 statements, standing up to cross-examination by able and experienced counsel.

Opinion is divided as to which was the more pivotal at trial – the evidence of John, or that of Craig Melnyk and George Lapchuk about the motel room re-enactment.

But in terms of the investigation, if Wilson and John had not said what they said to Roberts, police would have been left without a case against Milgaard to bring to court. I have tried to explain that on all the available evidence, a finding of coercion by Roberts or the Saskatoon Police of Wilson and John would

be unjustified. However, given the Commission's position on the meaning of wrongful conviction, as discussed above, Roberts' tactics did not get the truth.

What Wilson and John told Roberts and then recorded in the written statements can only be explained as lies, or mistakes, or a combination of the two. Wilson never did say that he witnessed an attack. He spoke of admissions by Milgaard, and of Milgaard's appearance at relevant times. But John told the police that she saw Milgaard stabbing the victim. Because of the great importance to the investigation of what she said, it is worth repeating that she must have been either mistaken, or lying. She had been up all night, perhaps had been using drugs, was very tired, and was looking outside a vehicle in dark, foggy conditions. Roberts, believing in Milgaard's guilt, interrogated her, using the shock tactic of displaying the victim's bloody clothing and appealing to her sympathy, asking her to suppose that the victim was her sister. She might have reconstructed the event in her own mind to conform to what Roberts was suggesting to her. We do not know, and I stop short of finding that Roberts coerced her into saying what she later said in her sworn statement. For the same reasons, she might have lied to Roberts, telling him what she perceived he wanted to hear. Whatever Roberts did, it led to Milgaard being charged with murder and then wrongfully convicted for that crime.

9. Charging and Arrest of David Milgaard

After consultation with Prosecutor Caldwell, Saskatoon Police charged Milgaard with Miller's murder. While in Prince George, British Columbia selling magazines, Milgaard learned that the RCMP were looking for him. He went to the detachment where he was arrested and taken to Saskatoon.

Part III – David Milgaard Criminal Proceedings

1. The Prosecutor and Defence Counsel

Caldwell, a crown prosecutor employed by the Attorney General for Saskatchewan for 11 years, was based in Saskatoon and was assigned to carry the Milgaard matter.

Milgaard was granted Legal Aid and he and his parents selected Calvin Tallis, a leading criminal lawyer in the province, to represent him. Milgaard and Tallis met several times in preparation for the preliminary hearing, and frequently during and after the hearing.

2. Crown Disclosure

Disclosure by the Crown to the defence was much more limited in 1969 than it is now. Police reports and notebooks were not disclosed nor, as a matter of course, were statements of witnesses whom the Crown did not propose to call.

Before the preliminary hearing concluded, Caldwell gave Tallis the following statements:

Albert Cadrain – March 2 and March 5, 1969

Ronald Wilson – March 3, May 23, May 24, 1969

Nichol John – March 11 and May 24, 1969

David Milgaard – March 3 and April 18, 1969

Dr. Harry Emson's Autopsy Report

In the practice of the day, police did not send their entire investigation file to Caldwell, selecting only those reports and witness statements which were, in their view, relevant. Caldwell ultimately received all the witness statements but not all investigation reports.

The idea of a single perpetrator for both the murder and the three earlier sexual assaults (finally demonstrated some 28 years later) was entertained for some time by the Saskatoon Police but not shared with Caldwell. The three earlier sexual assaults were detailed in separate investigation files. These files were not provided to Caldwell, nor was he specifically informed by the police that they had, for a time, believed that the perpetrator of the sexual assaults might have been the person who killed Miller. There were a few documents on the Miller investigation file that mentioned the sexual assaults and their possible connection, but the police did not specifically advise Caldwell about the common perpetrator theory. At the inquiry, both Caldwell and Tallis testified that at the time of Milgaard's trial, they were not aware of the three earlier assaults in 1968, nor of the police theory of a common perpetrator.

Caldwell did not provide Tallis with information related to the three sexual assaults, because he did not have it. Caldwell was provided with the statement of Victim 12 who reported an indecent assault on the morning of January 31, 1969, at 7:07 a.m. approximately eight blocks from where Gail Miller's body was found. A police officer had written "unrelated assault"²³ on the top of this statement. As a result, Caldwell did not consider it relevant to the prosecution of David Milgaard and he did not provide a copy to Tallis.

In today's world, the statement would have been provided and it would be up to defence counsel to decide relevance. At the time, police exercised discretion in their choice of material sent to the prosecutor and the prosecutor in turn used his discretion in deciding what would be helpful for the defence. There is little point in speculating as to what use might have been made by the defence of the Victim 12 statement had it been disclosed. The reported assault was markedly different in degree from the attack on Miller such that Victim 12 did not want to make a formal complaint. At most, it would have demonstrated the unlikelihood of Milgaard having assaulted Victim 12 at 7:07 a.m. when there was evidence that he was at the Trav-A-Leer Motel at or near that time.

3. The Preliminary Hearing

The preliminary inquiry took place over 10 days, with some adjournments needed to accommodate Tallis' other court commitments. On September 11, 1969, Milgaard was committed to stand trial.

John testified at the preliminary inquiry on September 4, 1969, but did not repeat the most incriminating parts of her May 24, 1969, statement.

She did testify that she saw a maroon handled paring knife in the car on the trip to Saskatoon from Regina and that Wilson and Milgaard had discussed purse snatching in Saskatoon. She remembered arriving in Saskatoon about 6:30 a.m. and stopping a girl for directions. She related getting stuck in the alley and Wilson and Milgaard leaving the vehicle. But John's next memory was of Milgaard getting into the car and the party driving off for the Trav-A-Leer Motel. Although she did not see blood on Milgaard's clothing, she related how he drove the vehicle around the block at the Cadrain house and that on the way out of Saskatoon he threw the cosmetic bag out of the window without explanation.

Caldwell and the police suspected that she was either trying to help Milgaard or that she was afraid of him. There is some evidence to support the latter. As reported to Caldwell by other witnesses, John was

overheard outside of the hearing room to say that she had seen it all, that it was a wonder he didn't kill her too and that she was going to say nothing. Caldwell made no use of these assertions at trial.

The Crown called Sgt. Bruce Paynter to testify regarding his analysis of the frozen semen found at the scene of the crime by Penkala. Paynter testified that the semen contained A antigens suggesting that the donor of the semen was of blood type A and a secretor – namely a person who secretes antigens into bodily fluids. It was not disputed that Milgaard was of blood type A. Paynter testified that a test of Milgaard's saliva did not reveal any A antigens, suggesting that Milgaard was a non-secretor. If Milgaard was a non-secretor, the semen could not be his unless there was some way that his blood found its way into his semen. The point was not lost on Tallis who argued before the judge that because Milgaard was apparently a non-secretor, he could not have contributed the A antigens in the semen unless some of his own blood was present in the sample taken from the snow. Of this there was no evidence, so Tallis argued that Milgaard could not be the donor of the semen and hence the evidence was exculpatory.

It is worth noting that Milgaard was committed for trial in spite of that and, as we shall see, he was found guilty at trial on the basis of other evidence and notwithstanding that the semen collected from the snow sample neither inculpated nor exculpated him.

4. The Trial

Milgaard's trial opened on January 19, 1970 before Chief Justice Alfred Bence and a jury of 11 men and one woman. The Crown called 44 witnesses over the course of 12 days. Milgaard did not testify nor did the defence call other evidence. The jury was charged on January 30, 1970, and returned a guilty verdict the next day.

(a) Motel Room Re-enactment Evidence

On the eve of trial, Sunday, January 18, 1969, as he was being driven from Regina to Saskatoon for the trial, Wilson reported something to police that resulted in the introduction of highly incriminatory evidence in the trial which had been unknown to authorities before then. Wilson told police that he had learned from Craig Melnyk and George Lapchuk that Milgaard had re-enacted the murder of Gail Miller at a party in a Regina motel room. This time, there was no question of Wilson being coerced or having fabricated evidence. There was also no question that Melnyk and Lapchuk told him that Milgaard had re-enacted the killing of Gail Miller.

Police related to Caldwell what they had heard and he, in turn, told Tallis, alerting him to the possibility of Melnyk and Lapchuk being called at the trial. On the opening day of the trial, Karst interviewed Melnyk and Lapchuk learning from them that there had been a party at the Park Lane Motel in Regina in early May of 1969 attended by many young people, including two girls and Milgaard, the latter three being under the influence of drugs. A news telecast concerning the Miller murder was seen by the group. Lapchuk suggested to Milgaard that he had killed the victim whereupon Milgaard grabbed a pillow on the bed, making stabbing motions and uttering words of admission that he had stabbed and raped Gail Miller. According to Melnyk, Milgaard "went crazy, he stabbed the pillow with his hand and was saying 'I killed her, I fixed her' and then he rolled off the bed and laughed hysterically".²⁴

Lapchuk described Milgaard's response as "He said yeh I did it. Then he blew up and started to stab with his hand and asked 'Where's my paring knife? He said yeh I stabbed her, I stabbed her 14 times and then she died.' I got scared and dropped the subject and no more was said about it."²⁵

Ute Frank, one of the girls in the room, told police that Melnyk, Lapchuk and another girl, Deborah Hall, were in the room and that she and Milgaard were taking drugs and having sex. She was hallucinating and not much aware of what was going on but recalled asking Milgaard if he killed the nurse and that he just looked at her and smiled oddly. At the time of trial, Hall was out of the province and could not be located by the police.

On day two of the trial, January 20, 1970, Caldwell received three statements from the police and delivered copies to Tallis. Caldwell completed his interviews of Melnyk, Lapchuk and Frank on January 23 and 24, and decided to call Melnyk and Lapchuk, but not Frank who was very upset and emotional. He so informed Tallis.

Tallis asked his client about the incident. Milgaard admitted that he was there, that he was high on drugs, but said that he could not remember stabbing the pillow or stating that he had killed Gail Miller. Still, he could not deny either the actions or the words attributed to him saying only that if he did say and do as alleged, it would have been a joke. He wanted Tallis to speak to Frank because she was his friend and would help him. Tallis did so but found in her a far better witness for the Crown than either Melnyk or Lapchuk. She described to him the incident in detail, confirming that Milgaard had re-enacted the stabbing and had admitted killing Miller. She believed Milgaard's admission that he had killed Gail Miller but said that she would not co-operate with the police. She appeared credible to Tallis. Quite reasonably, he concluded that she should not be called as a witness nor was he interested in finding Hall to get her version. In view of what his client had told him, Tallis could not ethically call any evidence to deny the incident. If Milgaard testified, he could not deny his words and actions and at the most could say that he was stoned and the re-enactment was a crude joke – not an explanation likely to win favour with the jury.

(b) Review of Trial Evidence

Not the least of the hurdles faced by Milgaard in seeking a review of his conviction was the fact that his friends and acquaintances had implicated him at trial without apparent motive. They were Cadrain, Wilson, John, Melnyk and Lapchuk.

(i) Albert Cadrain

Cadrain, while providing only circumstantial evidence of seeing blood on Milgaard's clothes, of Milgaard being in a hurry and throwing a woman's compact out of the car, nevertheless did not waver under cross-examination where he was closely questioned as to why he had not told the Regina Police about his suspicions when in their custody and when questioned by them. He denied intimidation by police.

(ii) Ron Wilson

Wilson underwent close examination and cross-examination at the trial. He told of stealing a battery but not of changing clothes in Regina, which his mother said they did. He admitted the elevator break-in and said that he noticed a reddish brown handled paring knife on David Milgaard. Arriving in Saskatoon between 5:30 a.m. and 6:00 a.m. they drove through a residential area, stopping a lady for directions.

She wore a dark coat. When she could not help with directions Milgaard commented "stupid bitch"²⁶ after they drove away.

He described getting stuck at an intersection, he and Milgaard getting out to push unsuccessfully and then heading off in different directions to look for help. He walked no more than five blocks and trotted back. When he arrived at the car, John was alone in it in a hysterical state, screaming. Five or six minutes later, Milgaard returned saying "I fixed her".²⁷ In his estimation, Milgaard had been away from the car for about 15 minutes. Two men in a cream coloured Dodge or Chrysler helped push them out and they went directly to the Trav-A-Leer Motel, and then to the lane behind the Danchuk residence where they got stuck and then headed to the Cadrain house. There he and Milgaard changed. Acid had damaged their pants and Milgaard's had the crotch ripped. Wilson said that he noticed blood on the front of Milgaard's pants. He went on to say that when leaving Saskatoon, John found a compact in the glove compartment, she asked whose it was, and Milgaard grabbed it and threw it out the window. Wilson had never seen it before, and it was not in his car earlier that day when they left Regina. He also told the court that when he was alone with Milgaard in Calgary the next day, Milgaard told him that he "hit a girl" or "got a girl"²⁸ in Saskatoon, that he put her purse in a trash can, and that he thought she would be okay. Even viewed on its own, this was highly incriminating evidence.

In some respects, Wilson's trial testimony differed from that at the preliminary inquiry where he had testified that he only went a couple of blocks after leaving the car. When questioned by Tallis about the change in his testimony, Wilson's explanation was that he had been thinking about it since the preliminary inquiry. Tallis also had him acknowledge that he had spoken to police officers in the meantime. Tallis succeeded in having Wilson acknowledge that he and Milgaard were too lightly dressed to be outside long in the severe weather and that he saw no blood on Milgaard when he returned to the vehicle, nor any wallet or compact.

Tallis also challenged Wilson on his criminal record and his statements to police, including that of March 3, 1969, the same statement that members of the Milgaard group later alleged had not been disclosed by Caldwell. Tallis had Wilson confirm his March 3 statement to the effect that none of the occupants of the car, including David Milgaard, were involved in the murder. Wilson told the court that up until about May 22, 1969, he had insisted to the police that Milgaard was not involved in the murder, but after having spent about six hours with them, he began to give them incriminating evidence, culminating in the statements of May 23 and 24, 1969. Tallis had to be cautious as he did not want any evidence left before the jury about Wilson having been polygraphed lest they infer that the polygraph verified his evidence.

On re-examination by Caldwell, Wilson confirmed that their vehicle became stuck at the intersection of Avenue N and 20th Street, right beside the funeral home and in the vicinity where Gail Miller's body was found.

(iii) Nichol John

John followed Wilson in the stand. Although in her examination-in-chief she omitted any reference to seeing a stabbing, in many respects she supported what Wilson had said, in some case adding incriminating details. She said she saw two knives in the car; one a maroon handled paring knife and the second a bone handled hunting knife. She related asking a woman on the street for directions, getting

26	Docid 005172.
27	Docid 005172.
28	Docid 005172.

stuck in an intersection of a street with a boulevard, freeing the car after five or six minutes only to be stuck in the alley behind the funeral home, a locale which she recognized after having been back there with the police. She told of Wilson and Milgaard leaving the car in opposite directions to seek help. She could not estimate Milgaard's time away from the car, and the next thing she remembered was his return to the car. Wilson was there before Milgaard. Milgaard looked cold. Her next memory was of stopping at a motel where Milgaard got a map. She then remembered being stuck again in an alley behind the Danchuk residence, after which they went to the Cadrain house. John confirmed that Wilson and Milgaard changed their clothes there, but she did not notice any blood on Milgaard's clothing.

John recalled going to a service station, driving out of Saskatoon, and finding a cosmetic bag in the glove compartment. She was able to describe in detail its contents and physical appearance. She asked whose it was, and Milgaard grabbed it and threw it out the window. The cosmetic bag was not in the glove compartment just before they left Saskatoon, according to her.

John's trial evidence had one glaring omission. When on the witness stand, she did not say that she saw Milgaard stab a woman in the alley, as she had reported in her May 24, 1969 statement to police. At common law, a party putting up a witness was not allowed to discredit the witness' credibility in cross-examination. Were it otherwise, it would lead to the abuse of punishing a witness for not saying what the party wanted to hear. An exception was made in the case of a witness who had given a previous inconsistent statement. This exception became codified in Canadian law with the enactment of s. 9 of the *Canada Evidence Act*. By invoking that section with a witness shown to be hostile, the party calling him could challenge the credibility of what he just said in the stand by reference to an inconsistent out of court statement. If counsel were successful, and even if the witness did not adopt the out of court statement for truth of contents, the desired result would have been achieved, and that would be nullification of the effect of the witness' evidence in the stand. Not long before the Milgaard trial, Parliament had added ss. (2) to s. 9, allowing for cross-examination on a previous inconsistent statement in writing. The section offered Caldwell a solution to just the problem he faced, although it was so new that little procedure had developed around its use.

After asking for submissions from Tallis and Caldwell on the procedure to be followed, the trial judge, contrary to their submissions, decided that evidence concerning the circumstances in which the out of court statement was made by John should be given in the presence of the jury. The Saskatchewan Court of Appeal was later to rule that he was wrong about this but that it made no difference in the circumstances of the trial. According to persuasive evidence I listened to in the Inquiry, the Court of Appeal was wrong. It made a great difference. What followed the judge's ruling has been described as a turning point in the trial and instrumental in the conviction of Milgaard.

Had Tallis been allowed to cross-examine John in the absence of the jury, he might have revealed circumstances in her handling by Saskatoon Police and by Roberts which might have convinced the judge not to permit cross-examination on the out of court statement. Faced with the risk of an affirmation of that statement in front of the jury, Tallis could not freely cross-examine on the circumstances. He could only hope that John would not affirm the most incriminating parts of her May 24, 1969 statement, leaving with the jury only her statement in examination-in-chief that she could not remember them. That much was in his favour, but the danger was that Caldwell would be allowed to put her entire statement to her, asking if she had made it and was it true. Legally speaking, the statement would only become evidence against Milgaard if she adopted it and the jury would have to be warned accordingly on the use to be made of such cross-examination. But would they heed the warning? What followed was, in the view of thoughtful and highly experienced trial lawyers whose testimony I accept, disastrous for the defence.

Statement in hand, and in the presence of the jury, Caldwell read to John those portions of her statement describing her witnessing Milgaard stab a woman.

She recalled meeting with Raymond Mackie and signing a statement that he wrote based on what she had told him.

At pages 3, 4 and 5 of her statement, she had described Milgaard grabbing a girl, dragging her down the alley and stabbing her. Asked if that was true, she replied that she did not know.

The judge, much given to interjections during counsels' questioning, asked "What do you mean you don't know, you signed them?".²⁹ That did not assist, John still insisting that she did not remember saying the things that Mackie had written on pages 3, 4 and 5. The judge then declared that she was a hostile witness without providing Tallis any chance to question her with respect to the circumstances of the giving of the statement. Caldwell asked for leave to prove a previous inconsistent statement and cross-examine on it. The judge complied, again without giving Tallis a chance to cross-examine on the circumstances of the taking of the statement in the absence of the jury. In the result, Caldwell was allowed to attack John's credibility, using the May 24, 1969 statement, before Tallis could ask her a question. Tallis did not have a chance to cross-examine John on any issues relating to the statement until Caldwell was finished his cross-examination.

A perusal of the trial record illustrates how the trial judge managed to destroy the credibility of John's examination-in-chief to the effect that she could not remember the incriminating parts of her statement, while at the same time those parts which she continued to say she did not remember were being read line by line in front of the jury:

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X-exam by Mr. Caldwell
of N. John on a
previous statement

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Q So just pausing there, Miss John, you're saying
that the girl was to the right and that's the
way that Dave went, is it?

A Yes.

Q And that's the truth now?

A Yes.

Q Did you tell Sergeant Mackie this:

"The next thing I recall seeing Dave in
the alley on the right side of the car.
He had ahold of the same girl he spoke
to a minute before. I saw him grab her
purse. I saw her grab for her purse
again."

10

Did you tell Sergeant Mackie those things?

A I don't remember.

THE COURT:

Q Do you remember any part of it?

A No.

Q Are you saying you didn't tell Sergeant Mackie
that?

20

A I'm saying I don't remember if I did or if I
didn't.

Q Well, if you did see the accused grab the purse
it's something you would have remembered, isn't
it? Isn't it? Witness?

A I don't know.

Q Take a drink of water and stop crying.

A If I could tell you what happened I'd tell you.
I don't know. I can't remember.

Q The point is this. You told Sergeant Mackie on
March the 22nd according to this statement. Now
are you saying you did tell Sergeant Mackie or

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X-exam by Mr. Caldwell
of N. John on a
previous statement

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you didn't tell him?

A I don't know if I did.

Q Did you see Dave have ahold of the girl?
Did you see Dave have ahold of the girl?

A I don't remember anything. My mind is a blank.
Nobody understands. Nobody wants to believe me.

Q You remember the other things, don't you?

A Yes I do.

THE COURT: Go ahead.

MR. CALDWELL: I propose to go on - 10

Q Alright, Miss John, if you will try and just
follow along with this and we'll get through it -
you have told His Lordship now that you don't
remember whether you told Sergeant Mackie that
last group of statements?

A Yes.

Q Do you remember whether that's what happened or
not?

A I don't remember anything.

Q Did you tell Sergeant Mackie this: 20
"Dave reached into one of his pockets and
pulled out the knife. I don't know which
pocket he got the knife from. The knife
was in his right hand."
Did you tell Mackie that?

A I don't remember.
did

Q Alright; and/that happen in fact whether or not
you told Mackie?

A I don't know.

Q Did you tell Mackie this: 30
"I don't know if Dave had ahold of this
girl or not at this time. All I recall ."

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X-exam by Mr. Caldwell
of N. John on a
previous statement

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".. is seeing him stabbing her with the knife."

Did you tell Mackie that?

A I don't remember.

Q And whether or not you remember telling him, did
that happen? Did you see that?

A I don't know.

THE COURT:

Q You don't know whether it did or it didn't?

A No, I don't.

MR. CALDWELL:

10

Q Now, Miss John, I put it to you that that is
something you absolutely would never forget if
you saw that happen?

A As far as I'm concerned I don't know what
happened. I don't even know if I was on that
trip or not.

THE COURT:

Q Well, you've already given evidence that you
were on the trip - very extensively yesterday.
Have you forgotten since yesterday that you told 20
us you were on the trip?

A If you just stop and think how much this bothered
me - I'm beginning to wonder if I even did it or
not.

MR. CALDWELL:

Q Alright; did you tell Sergeant Mackie:

"The next I recall is him taking her around
the corner of the alley. I think I ran
after that. I think I ran in the
direction Ron had gone."

30

Did you tell Mackie that?

A I don't know.

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Near the end of her examination we read:

Mr. Caldwell:

Q So that your position today is, as I understand you, that you don't know whether you saw Dave in the alley with the same girl that he had spoken to shortly before for directions?

A No I don't.

Q Alright; and you don't know whether you saw him grab her purse . . . ?

THE COURT: Excuse me a minute, just a minute -
(to the witness) It's very easy for you to 30
stop crying because you've done it several times
when you were asked a question with which you
would agree - so would you please stop crying. 30

At the conclusion of Caldwell's examination-in-chief, the judge gave appropriate warnings to the jury to use only those portions of John's May 24 statement which she had adopted in the stand for proof of contents, the rest being admissible on the issue of her credibility. At Tallis' request, he repeated his warning in plain language for the jury.

Thoughtful commentators have written (and some testified before us) that the warnings would have been ineffectual. Once the credibility of her trial evidence that she could not remember had been destroyed, the jurors could only conclude that the truth lay in her May 24 statement.

Had Tallis been allowed cross-examination on the circumstances surrounding the taking of the statement, in the absence of the jury, he could have aggressively questioned John about her dealings with the police, specifically Mackie and Roberts, without fear of an adverse answer from her being accepted by the jury. Either he or the Crown might have called Mackie and Roberts to testify about circumstances in the absence of the jury, the result of which, as mentioned, might have been no cross-examination on the statement at all, leaving the jury with only her evidence-in-chief which omitted any reference to a stabbing.

In the end, John had not adopted the most incriminating parts of her May 24 statement, but the jury heard them nonetheless although warned against their use for truth of contents. Tallis had no basis to cross-examine John about incriminating things she now said that she could not remember having described in her statement, because she had not adopted them.

The judge's view, as Tallis saw it, was that John was trying to protect Milgaard so his first concern was to show that he, Milgaard's lawyer, had not spoken with John before the preliminary inquiry. That was the case. Tallis quizzed John about her dealings with the police in the crucial interval of May 22 to 24, 1969,

about her drug use and the effect that might have had on her memory. He asked about her stay in the police station but she said that she had been in a cell for only "about two minutes"³¹ and was then moved into the matron's room.

(iv) Craig Melnyk and George Lapchuk

Informed opinion seems equally divided as to which was the more damaging to Milgaard's defence – the s. 9(2) questioning of John or the evidence given by Melnyk and Lapchuk. They testified in conformity with their statements, Melnyk describing Milgaard on his knees on the bed with a pillow between his legs hitting it as though stabbing and saying "I killed her or something fourteen times – either I killed her or I stabbed her fourteen times. And then he said 'I fixed her'".³² Milgaard then rolled on his side and started to laugh. Others in the room sat in a daze and dropped the subject.

Tallis' cross-examination was effective, establishing that Melnyk was a regular drug user with a criminal record and some pending charges before the court. Significantly, Melnyk confirmed that it was not until he had been charged with armed robbery that he spoke to the police.

Quickly taking up the thought, the trial judge asked Melnyk to whom his first disclosure was made and the answer was that Melnyk had told Wilson a couple of weeks earlier before speaking to the police, nicely undercutting the effect of Tallis' earlier questioning.

Lapchuk's description had Milgaard jumping off the bed, straddling a pillow and saying "Where is my paring knife?" and then making stabbing motions and saying "yes I stabbed her, I killed her, I stabbed her 14 times and then she died".³³ Milgaard then looked at the shocked Lapchuk, shrugged his shoulders, smiled and gave a little laugh. Tallis cross-examined Lapchuk about his criminal record, but as mentioned before, could not suggest that the incident did not happen because his own client admitted that it might have.

Neither did he ask Melnyk and Lapchuk about their interpretation of the event as a joke or as being serious. Based on his discussion with Frank, who Milgaard said was a friend and would help, and learning from her that she took the matter seriously, he was concerned that Melnyk and Lapchuk might agree with her. His concern was well founded because in later years, both Melnyk and Lapchuk confirmed to others that they thought Milgaard was serious, and was not joking.

(v) Walter and Sandra Danchuk and Robert Rasmussen

The Crown called evidence favourable to Milgaard. From Rasmussen, the operator of the Trav-A-Leer Motel, the jury heard that when Milgaard came to the motel shortly after opening time at 7:00 a.m., Rasmussen saw nothing unusual about Milgaard except that he did not have shoes. The Danchuks testified that Milgaard spent 40 minutes inside their home from about 7:30 a.m., and they did not notice any blood on his clothing or anything unusual about his behaviour.

(vi) Secretor Issue

Caldwell introduced evidence about the semen found by Penkala near the crime scene. Although on its face it was exculpatory because Milgaard was thought to be a non-secretor, Caldwell thought that he

31	Docid 003049.
32	Docid 002134.
33	Docid 006010.

should put it in as part of the circumstances. At the same time, he suggested to the jury that the antigens present in the sample could have come from whole blood of the semen donor. The antigens were type A and Milgaard's blood was type A.

Paynter of the RCMP lab gave uncontroverted evidence that the semen was of human origin and contained A antigens, so that it came from a person of blood type A who secreted antigens into his bodily fluids. He could not rule out the possibility that it also might have come from a group AB secretor.

He tested the fluid for the presence of blood and, although the test was positive, it was not conclusive. Caldwell asked how much blood was revealed in the test, Tallis objected and the judge observed that there was no proof of any blood in the seminal fluid.

Paynter testified that a test of Milgaard's saliva did not disclose A antigens, leading to the belief that he was a non-secretor.

On the basis of the Crown's evidence, therefore, the jury could only conclude that Milgaard was a non-secretor, and that he could not have contributed the A antigens in the semen which, in turn, had not been shown to be present from contamination of the sample with whole blood. The evidence was exculpatory.

Tallis had achieved a favourable result only to be interrupted in his cross-examination by the trial judge. Justice Bence had already stated that there was no evidence of blood in the semen, but then got Paynter to agree that he could not say whether or not there was blood in the semen, but that in his opinion blood probably accounted for the A antigens. In the result, he could not definitely say that the person whose seminal fluid he examined was a secretor or a non-secretor. The effect of this concession was that evidence which at first appeared to be exculpatory was neutralized. It neither inculpated nor exculpated Milgaard. At the Inquiry, Paynter thought that despite this, the trial evidence on this point tended to show that Milgaard was not the donor of the semen, based on the assumption that he was a non-secretor.

As it turned out, in 1992, when a definitive test was done, Milgaard was shown to be an A secretor. Had that been known at trial, he could not have been excluded as the donor of the semen, with all that that implied relative to the rape and murder. In other words, it would have been inculpatory evidence, although not definitive by any means. Emson's trial testimony to the effect that young males commonly bled into their semen was incorrect. This undermined to some extent Tallis' submissions that the evidence was exculpatory because it offered an explanation as to why A antigens were present in the semen of a non-secretor, as Milgaard was thought to have been. On balance, however, the serological evidence was not inculpatory.

(c) The Decision not to Testify

In a criminal trial, once the Crown has presented its case, the accused must decide whether to call evidence in his own defence. He is not obliged to do so and no inference may be drawn against him by the jury if he decides not to call evidence.

The responsibility on defence counsel's shoulders at this point is heavy. The accepted wisdom is that in a case tried by jury, its members want to hear from the accused that he did not do it. On the other hand, accused who testify before a jury frequently condemn themselves out of their own mouths. Younger ones tend to put their own characters in issue, inviting close cross examination and leaving a poor impression with the jury.

Tallis was not one to shirk what he saw was his responsibility to advise the client on whether or not to testify. Some defence counsel leave the decision entirely up to the client, but here the decision was made by Milgaard only after receiving his lawyer's advice in consultation with his parents. Tallis obtained a signed waiver confirming the decision not to testify. His advice was based partly on the fact that Milgaard's version of events on the morning of January 31, 1969, was corroborated by Wilson, John and Cadrain so that if he testified he would have confirmed the following:

- that he had a knife in his possession on the trip from Regina to Saskatoon (although not a maroon handled paring knife).
- that he and Wilson discussed "rolling" people and stealing purses.
- that in looking for Cadrain's house, the Milgaard vehicle was travelling between 20th and 22nd Street, up and down the avenues at or around the time Gail Miller was murdered (and therefore in the general vicinity).
- that they stopped a woman for directions and although Milgaard said she was much older than Gail Miller, he corroborated Wilson and John's story that they stopped her and asked for directions.
- that shortly after stopping the woman, the Wilson vehicle became stuck and that he and Wilson left the vehicle looking for help. Milgaard said he was only gone for a couple of minutes, which differed from Wilson; however, it did put Milgaard away from the vehicle and away from his friends, albeit for a short time, but in the vicinity where Gail Miller's body was found.
- that at Cadrain's house he changed his clothes, but not because he had blood on them and that he drove Wilson's car around the block, because he "liked to drive".³⁴
- that he would confirm the evidence of Wilson, John and Cadrain regarding the woman's compact in the glove compartment, namely that he grabbed it and threw it out the window and that he could not provide an explanation for his behaviour nor could he say where the compact came from.
- that with respect to the motel room re-enactment, he was there with the people who said they were there and that he was very stoned and might well have done and said what Melnyk and Lapchuk attributed to him. His only response would be that he was stoned and that he was joking. He was not in a position to deny that he stabbed the pillow or uttered words to the effect that he killed Gail Miller.

In addition to corroborating key parts of the Crown's case, there was one other fact of which the Crown and police were unaware. Milgaard had told Tallis that when they stopped the woman for directions, he thought about stealing her purse. If he testified, Tallis was certain that this would have come out from cross-examination by Caldwell. The only favourable evidence Milgaard could have provided is that when he left the vehicle after it got stuck in the vicinity of where Gail Miller's body was found, he neither met nor attacked Gail Miller.

Tallis was also concerned about Milgaard's drug use and his "hippie lifestyle". He had reason to be concerned. Persons of the writer's vintage would not disagree that the bemused tolerance with which hippies were regarded in San Francisco, for example, in the 1960s was not an attitude shared by Western Canadians.

In Saskatoon, in 1969, the police's attitude toward youth was described by Chief James Kettles in the Saskatoon Police's 1969 Annual Report. Although not expressly aimed at hippies, Chief Kettle's

comments are still relevant to assessing the prevailing attitude of police towards youth and societal change at the time:

"The greatest explosion now taking place in this country is not in the economy, but in crime arising from the inadequate lack of support for and disrespect of Police efforts. We witness acts of civil disobedience perpetrated by people who make use of the law for the purpose of breaking the law on the baseless pretence of protecting freedom. I believe that young people have a right to challenge the ideas of their elders and certainly they have a right to advocate change, as do any of us, but that right is a long way removed from the violence which we frequently witness today and I submit that what is needed in this country is the launching of a movement to teach and encourage all people to recognize and personally practice the true meaning of freedom. It must be an immediate concern to do everything in our power to end those very things which undermine and destroy the souls of men."³⁵

At the time of his first interview with the police on March 3, 1969, David Milgaard indicated that he had lived a hippie lifestyle for about a year-and-a-half and had traveled all over Canada and some of the United States during that time. Milgaard's traveling companions Wilson, John and Cadrain also fit into the hippie stereotype. Recurring references to drug use (particularly marijuana and LSD) by Milgaard, John, Wilson and Cadrain, the 'spur of the moment' decision to travel west towards Vancouver and find drugs along the way, stops at 'hippie houses' like Cornwall House in Regina, and David Milgaard's public acts of sexuality in the motel room with Ute Frank in Regina are all examples of Milgaard's hippie lifestyle prior to his arrest for Gail Miller's murder. Further, police documents indicate that the police were of the view that David Milgaard and his friends associated with the "hippie element" and were users of marijuana and LSD.

It is possible, of course, that an institutional bias amongst policemen against hippies existed in 1969, but if it did, I have no evidence that any policemen who dealt with Milgaard allowed it to influence their actions towards Milgaard and his companions. On the contrary, I heard from some police witnesses that they were conscious of their youth and treated them with kid gloves as a result.

But the societal bias undeniably existed and, to the extent possible, Tallis had to shield his client from the real possibility that he would be viewed as a degenerate by the jury under cross-examination, should he testify.

(d) Closing Submissions and Charge to the Jury

In a criminal trial by judge and jury, it is the jury's responsibility to find the facts from the evidence and the exhibits which are placed before them. Members of the jury listen to both the Crown and the defence argue what the facts must be, based upon the evidence, but the jury is not bound by what they say. The judge is responsible for explaining the law to the jury and showing them how to apply the facts, as they find them, to legal principles. In doing this the judge reviews the evidence for the jury, but again the jury is not bound by this review or even by any opinion the judge might give with regard to the evidence. The members of the jury must, however, accept his or her explanation of the law. The judge's charge follows the addresses of counsel, and it is critical because it is the last word the jury hears. Similarly, as between Crown and defence, counsel think it advantageous to have the last word and the rule is that whichever counsel last called evidence in the trial must address the jury first. In this trial, no evidence was called by Tallis, so he had the last word, with Caldwell going first.

(i) Caldwell's Address to the Jury

Caldwell outlined the position of the Crown:

- The Crown's theory was that Miller left home and was walking down either Avenue N or Avenue O (on the basis of the evidence Caldwell suggested that it was Avenue N). The Milgaard vehicle stopped Miller somewhere between 21st and 20th Street and then shortly after became stuck. He said that it was "absolutely inescapable"³⁶ that the car was stuck in the very block from which they had stopped the girl for directions, and that the woman stopped must have been Gail Miller.
- Milgaard's attack on Miller began as an attempted purse snatch that was met with resistance and then led to a struggle, stabbing and then rape, likely when Gail Miller was unconscious or dead. Milgaard then took her wallet and cosmetic bag to search later.
- Caldwell acknowledged the discrepancy in the location where Wilson and John each described the vehicle being stuck. He said the jury could find one or the other or a combination of the two.
- Milgaard disposed of Miller's wallet at Cadrain's (while driving Wilson's car around the block) and used the toque that was found at Helen Gerse's home to wipe blood off his clothing or himself. He changed his bloody clothes at Cadrain's house and then later disposed of them.
- Rasmussen and Danchuks did not see blood on Milgaard, because they may not have paid attention to his clothing and Milgaard's coat may have covered the blood on his shirt and pants.
- The cosmetic bag thrown out the window of Wilson's vehicle on the way to Calgary belonged to Miller. Milgaard's throwing the cosmetic bag out without explanation was a "classic example of actions speaking louder than words".³⁷
- Caldwell urged the jury to believe the evidence of Wilson as Wilson showed no animosity towards Milgaard and at first had withheld information from Riddell of the RCMP during the earlier stages of the investigation. He later told the true story on May 23rd and 24th. Caldwell said that if Wilson was "out to get Milgaard or frame him", he could have done a far better job than what his evidence portrayed. Instead of Milgaard saying that he "fixed her", he could have said he "stabbed or killed" her.³⁸
- The jury should believe John's evidence of the events of January 31, that she recalled, however they should not believe her when she said she didn't recall the key parts of her May 24, 1969 statement, namely that she witnessed Milgaard grab a girl, drag her down the alley, and stab her. Where John said she couldn't recall this, Caldwell said John was telling less than the truth as she knew it. In assessing her credibility "as to this part of the episode"³⁹ the jury should recall the kind of very unsatisfactory evidence she gave about being unable to remember some things at all. Caldwell repeated the unadopted parts of John's statement telling the jury that John could not remember whether she had seen Milgaard in the alley taking hold of a girl and that she could not remember whether she had seen him grab her purse, that she could not remember whether she had seen Milgaard reach into his pocket and pull out the knife and stab her with the knife. He

36 Docid 141905 at 909.

37 Docid 141905 at 920.

38 Docid 141905 at 930.

39 Docid 141905 at 927.

then said "I ask you to decide whether a person, if they had seen such events as she evidently once said, could ever forget them. It seems to me that they would be engraved on her mind."⁴⁰ When she was giving her evidence she was not telling the truth, the whole truth and nothing but the truth about "this vital part of the whole incident"⁴¹ while she could recall in detail events happening both before and after that vital scene of the episode.

When a witness gives evidence on the stand which is inconsistent with an out of court statement and is then challenged about it under s. 9(2) of the *Canada Evidence Act*, the Crown hopes to at least neutralize the effect of the trial evidence and at most hopes to have the witness adopt her out of court statement. What the Crown was attacking in terms of John's trial evidence was her statement that she could not remember some parts of her May 24 statement to police. Caldwell more than succeeded. Not only was John's credibility about not remembering destroyed, the impression was left with the jury that what she said she couldn't remember while in the stand (the stabbing) actually must have been the truth.

- With respect to the frozen semen found near the scene, Caldwell reminded the jury that the vaginal aspirate which was discarded by Emson, was blood stained. He referenced Paynter's evidence and noted that Paynter couldn't say definitely whether or not the person whose seminal fluid he examined was a secretor. Caldwell said the semen did not have the effect of identifying Milgaard alone as a source of that spermatozoa, but it did not eliminate him and that he was "one of the thousands".⁴² He then asked the jury to remember that Milgaard did not have to be a secretor to get 'A' antigens in his spermatozoa, if the antigens were found there as a result of whole blood being in his spermatozoa for the reasons Emson mentioned. Caldwell concluded by saying "So I leave that phase of the matter by stressing again that while this part of the evidence does not, of itself, identify the accused, it most certainly does not eliminate him."⁴³ The fact of the matter is that Emson's trial testimony, that young men commonly excrete blood into their semen, was incorrect, something he acknowledged at the Inquiry. The excretion of blood into the urine occasionally happens but it is not common. So Caldwell's statement "it most certainly does not eliminate him"⁴⁴ was an overstatement in view of the premise that Milgaard was a non-secretor. Years later, the premise was itself found to be incorrect when Milgaard's status as a secretor was confirmed. One might say that Caldwell was correct for the wrong reasons.
- With respect to the motel room incident, Caldwell reminded the jury that this was one of Milgaard's two voluntary admissions, the one earlier being to Wilson. He stressed the fact that the people in the motel room were completely independent of Milgaard's travelling companions, Wilson, John and Cadrain. He also said that Milgaard's admission in the motel room about the paring knife and the details were such that only the true killer would know. Caldwell said that Milgaard's admissions in the motel room were not only consistent with his guilt, but were inconsistent with any other explanation.

40	Docid 141905 at 928.
41	Docid 141905 at 929.
42	Docid 141905 at 939.
43	Docid 141905 at 940.
44	Docid 141905 at 940.

(ii) Calvin Tallis' Address to the Jury

Tallis' address to the jury was not part of the official trial transcript. In 1992, as part of the Supreme Court Reference, and to assist him in his evidence, the court reporter's short hand notes of Tallis' address to the jury were located and transcribed. Although the transcript is accurate, there are gaps.

Ethically, Tallis could not urge the jury to make findings which were inconsistent with things that Milgaard had told him. He could not suggest, therefore, that the Wilson vehicle was nowhere in the vicinity of Miller's body; or that it was not stuck; or that Milgaard did not leave it; or that Milgaard did not have a knife on his person; or finally, that Milgaard had not thrown a compact out of the vehicle after leaving Saskatoon.

The following is a summary of Tallis' submissions:

- **Physical Circumstances**

Tallis repeatedly told the jury to consider the weather that morning when looking at the plausibility and possibility of the Crown's theory of how Milgaard committed this offence. He suggested that there was not sufficient time for Milgaard to have committed the rape and murder, referring to the fact that Miller's coat had to have been removed, her uniform dress pulled down off her arms, then her coat put back on, and the boots, sweater and other items scattered in the alley. He referred to the seminal fluid being found on Miller's panties down by her ankle, suggesting the attack started somewhere else and ended in the alley. If it all did take place in the alley including the scuffle, it would take some time. He essentially said that it was not possible for Milgaard to have committed this crime in the time period that Wilson alleged he was away from the car.

- **Cosmetic Bag**

He asked the jury to conclude that the cosmetic bag which Milgaard threw out of the vehicle could not have come from Gail Miller's purse, because the purse was full when it was found and contained make-up as well.

- **Conduct of David Milgaard**

Tallis submitted that there was no evidence that Milgaard and his friends were on liquor or drugs that morning. He referred to the fact that Milgaard was very co-operative with the police in questioning and in providing samples such as bodily fluids and hair.

- **Observations of Danchuks and Robert Rasmussen**

Tallis asked the jury to put more weight on the evidence of credible citizens such as the Danchuks and Rasmussen, as opposed to Wilson, John, Cadrain and the motel room witnesses. The former were solid and sincere citizens and had an opportunity to view Milgaard's clothing and his demeanour shortly after Milgaard was alleged to have committed the rape and murder. Rasmussen noticed Milgaard enough to note that he was not wearing shoes and the Danchuks spent a considerable amount of time with Milgaard in their home. He said they did not notice anything unusual about Milgaard's clothing, his demeanour, and saw no blood or scratch marks. Tallis said that based upon the photographs of Miller's body, whoever committed the act would have significant blood on their outer garments. Tallis also referred to the fact that the garage people saw nothing unusual with Milgaard.

- **Albert Cadrain**

Tallis said it was strange that Cadrain had no memory of seeing blood on Milgaard's clothing, and of Milgaard being in a hurry, when he was questioned by Regina Police one week after the murder. He also criticized Cadrain's evidence about Milgaard being in a hurry to leave, in light of the evidence that after the car got fixed, Milgaard went driving around looking for Cadrain's girlfriend before they left the city.

- **Ron Wilson**

Tallis said that Wilson was the least credible of all the witnesses. He said that there was uncertainty about where the car was stuck (but not that it was stuck), and questioned whether it was where either Wilson or John said. He referred to the fact that Wilson doubled the distance he went when he left the car between his evidence at the preliminary hearing and trial. He said all of the changes in Wilson's evidence were detrimental to Milgaard. He said that even with Wilson's evidence on the time that Milgaard was supposedly away, the rape and murder could not have happened as the Crown outlined. He said according to Wilson's trial evidence, their car was never in the alley, and Wilson saw no blood on David's hands or outercoat.

Tallis also referred to Wilson's original statement that he gave to Inspector J.A.B. Riddell, in which he said that it was quite clear Milgaard had nothing to do with the murder and that he did not see any blood on Milgaard.

Tallis also took issue with Wilson's statement in which he said that Milgaard told him in Calgary that he had hit or jabbed a girl and thought she would be alright. In testimony Wilson said that he didn't believe it when Milgaard told him that, yet Wilson had already testified that the day before when Milgaard got back in the car he said "I fixed her" and he saw blood on Milgaard.

- **Nichol John**

Although the eye witness account in John's statement was not before the jury for truth of its contents, the jury was aware that she had made such a statement to the police. Tallis took issue with the reference in her statement to seeing a girl stabbed. Even though it wasn't evidence for truth of its contents, Tallis questioned whether this part of John's statement was even a possibility since the stab wounds were made after the coat was taken off, the dress taken down and then the coat put back on.

- **Physical Evidence**

Tallis emphasized the fact that there were no fingerprints, hair samples, or any other physical evidence that linked Milgaard to the crime.

With respect to the seminal fluid that was found by Penkala, he said that there was no evidence that Milgaard had any condition to cause him to bleed into his seminal fluid. The donor of the semen was an A secretor and if there was no blood in the seminal fluid then it could not be Milgaard's. He said that if there was blood in the semen, then it was most likely from Miller, as the frozen semen was scooped up four days later. He said his version was far more probable than Caldwell's possibility, and that the secretor evidence was "heavily in favour of David".⁴⁵

- **Motel Room**

Tallis asked the jury not to gloss over the circumstances and the characters of the witnesses, and that even if the jury found some comments were made, to look at the background. He said that everyone there knew Milgaard had been questioned by the police and therefore would have known some details.

(iii) Trial Judge Charge to the Jury

The trial judge's charge to the jury was not criticized by either Caldwell or Tallis and was not a ground of appeal when the matter was argued before the Court of Appeal. Tallis considered the charge to be favourable to Milgaard. The judge made the following comments to the jury:

- Gail Miller could have taken three routes that morning to the bus stop, Avenue O, Avenue N or through the alleyway out the T end. He said there was no evidence to show positively that the woman who was walking down the street and stopped by the Milgaard group was Gail Miller.
- There was evidence that tended to show that Milgaard was in the locality at or about the time the murder was probably committed. He said there was evidence that the jury could accept or reject regarding blood stains on Milgaard's clothing, there was the evidence of Wilson, the emotional condition of John when he returned to the car after he and Milgaard had departed looking for help. There was the evidence that Milgaard said "I fixed her".
- Unless John adopted evidence and admitted it while testifying it could not be considered as evidence against the accused. It could only be used by the jury in judging her credibility.
- Although relevant to the question of whether Milgaard took the deceased's purse, the compact which he threw out of the car might have had nothing to do with the deceased because there was nothing to link it to her. As well, the purse contained items which were duplicated amongst the contents of the compact.
- Motel Room re-enactment – What would be the motive of "these persons of dubious character" [Melnyk and Lapchuk] in implicating Milgaard? Both had been charged with crimes themselves. Were they trying to ingratiate themselves with police? It was for the jury to decide.
- The window of opportunity for Milgaard to commit the crime was somewhere between 6:45 and 7:10 a.m., he suggested, based on Miller being ready to leave the house between 6:35 a.m. and 6:45 a.m. and Milgaard arriving at the motel around 7:10 a.m. In fact, the window of opportunity would even have been less because it would have taken them a number of minutes to drive to the motel.
- As to the Crown's theory that Miller may have been unconscious or dead when she was raped, if that were so, the rapist would be "pretty well covered with blood".⁴⁶ If Milgaard had done it, surely the Danchuks would have seen the blood even though they were not looking for it.
- Some evidence was not of much assistance. Miller's wallet, found near Cadrain's house, did not link Milgaard because whoever robbed Miller may have thrown it anywhere. The toque was of no consequence. It might have belonged to a boy who got a nose bleed. Nothing connected it to anybody in the Milgaard group.

- If John was in a hysterical state, as suggested, because she was afraid of Milgaard, one would think that she would have taken the first opportunity to leave the car and not return to continue with the other two on the Edmonton trip.
- Of considerable importance was the issue of whether Milgaard could have had the time to rape, murder and steal.

(e) Verdict

The jury deliberated for approximately a day and returned a unanimous verdict of guilty. As required under the *Criminal Code* at the time, Milgaard was sentenced to life in prison with no eligibility for parole for 10 years.

5. Appeals

Tallis filed a Notice of Appeal 10 days after conviction, and prior to approval by Legal Aid, being prepared to carry the appeal without compensation, if need be.

The appeal alleged errors in:

- (a) the application of s. 9(2) of *The Canada Evidence Act*. The initial cross-examination by Caldwell on the statement should have been conducted in the absence of the jury and the trial judge "should have permitted counsel for the defence to question the witness concerning the circumstances under which the statement was obtained and [adduce] evidence in this connection, before making a ruling as to whether or not the witness was adverse".⁴⁷ By permitting cross-examination of John by Caldwell in the presence of the jury before any declaration was made as to her being adverse Milgaard was so prejudiced that the jury would have been adversely influenced in arriving at their verdict.
- (b) the admission of the motel room re-enactment evidence which had "no real probative value and yet was highly prejudicial in nature to the appellant".⁴⁸
- (c) the verdict was unreasonable and could not be supported by the evidence.

Serge Kujawa argued the appeal for the Crown on November 6, 1970. Written factums were not used at the time, the court basing its decision solely on oral arguments and filed materials such as the transcript of the trial evidence.

The appeal was dismissed on January 5, 1971 with reasons which appear in the judgment annexed as Appendix E to this report. The Court ruled that Tallis should have had the chance to cross-examine John in the absence of the jury as to the circumstances under which her May 24 statement was given to police. However, he later examined her in the presence of the jury and, the Court concluded nothing occurred there to the prejudice of the accused which would not have occurred had the proper procedure been followed. Hence Milgaard was "not in any way prejudiced by the procedure which the learned trial judge followed".⁴⁹

In his Inquiry evidence, Tallis explained that the accused was in fact prejudiced. Permission for Caldwell to use John's May 24 statement to attack her credibility should have been based upon a complete record

47	Docid 006851.
48	Docid 006851.
49	Docid 009340.

of the circumstances under which she gave the statement, and Tallis was constrained in examining the circumstances because the jury was present and she might have affirmed her statement if he questioned her too closely. Had a *voir dire* been held, he could also have cross-examined Roberts and Mackie on the circumstances of their interviews and the taking of the statement. They had left no record of the circumstances, a fact which called for an explanation. Tallis might have been able to demonstrate that the May 24th statement was not trustworthy and that Caldwell should not be allowed to use it to attack John's credibility.

In the result, before Tallis had a chance to ask John any questions, Caldwell had put the most incriminating parts of the statement to John line by line.

Noting that s. 9(2) was new and had not been the subject of interpretation by the courts, the Court of Appeal set out a procedure to be followed, which became known as the "Milgaard Rules" which require that a *voir dire* be held to determine the circumstances under which the supposedly inconsistent statement was made. Defence counsel then has the chance to cross-examine the witness on the circumstances without fear of having her adopt incriminating parts of the statement. He also has the opportunity to call evidence on circumstances from witnesses who had personal knowledge of them. Tallis might have called Mackie and Roberts for the purpose without fear of anything they might say coming before the jury. As a result, he might have obtained evidence that reflected on the trustworthiness of what she told Roberts and then repeated to Mackie. A statement which is in itself untrustworthy should not be used to attack the credibility of inconsistent *viva voce* evidence under oath. The trial judge had discretion under s. 9(2) to disallow cross-examination on that account. But Tallis was not given the chance to demonstrate the unreliability of the statement in the absence of the jury.

In fact, before he had the chance to ask any questions, the witness had been declared hostile and Caldwell had been allowed to cross-examine her on the statement, putting to her the most incriminating parts of it. She did not adopt them, but in the view of some observers, including Tallis, the damage was done. The judge seemed to think that John was feigning her lack of recall to help Milgaard, or because she was afraid of him. There was no point, when he finally got the chance to cross-examine, in attacking the truth of what she said in her May 24 statement when she had not adopted it on the stand.

Even if the Milgaard Rules had been followed at his trial, their efficacy would depend upon the jury following the judge's instruction to take for proof of contents only, those parts of the statement adopted by the witness in the stand. At least two observers of the trial, Calvin Tallis and Murray Brown, were to testify that in their view not only did the witness appear to be lying when she said she could not remember what she told the police, but the jury probably concluded that the truth lay in her May 24 statement. A second difficulty was that Tallis could not challenge the unadopted contents of the statement which were so incriminatory because John had not adopted them. According to Tallis, he would have been better off had she adopted the incriminating parts of the statement which he could then have challenged on the merits.

Milgaard was denied leave to appeal to the Supreme Court of Canada on November 15, 1971, ending judicial proceedings relating to his conviction.

Part IV – Larry Fisher Arrest and Convictions 1970 - 1980

1. Introduction

At the time of Milgaard's conviction, Fisher was not known to Saskatoon Police nor was he a suspect in either Miller's murder, or in the three sexual assaults he committed in the months preceding Miller's murder. On February 21, 1970, three weeks after Milgaard's conviction, Fisher committed another sexual assault in west Saskatoon. He was not a suspect in the police investigation which followed, and in the summer of 1970 he moved to Winnipeg to work. He committed sexual assaults on August 2 and September 20, 1970 and was apprehended by the Fort Garry Police in the course of committing the latter assault. He was arrested and charged with the two Fort Gary assaults. He later confessed to the Fort Garry Police and the Saskatoon Police that he had committed two earlier assaults in Saskatoon. He was subsequently charged with four Saskatoon sexual assaults.

Fisher instructed his legal counsel that he wished to plead guilty to all of the Manitoba and Saskatoon charges. On May 28, 1971, Fisher was convicted in Manitoba Court on two counts of rape and was sentenced to 13½ years. On December 21, 1971 he was convicted in Saskatchewan Court on three counts of rape plus one of indecent assault, and was sentenced to terms of imprisonment concurrent to the Manitoba sentence. Serge Kujawa acted for the Attorney General of Saskatchewan in the disposition of Fisher's Saskatchewan charges. Kujawa had earlier represented the Attorney General in Milgaard's appeal to the Court of Appeal which was argued on November 6, 1970.

In 1990 and the years that followed, the Milgaards alleged that the Saskatoon Police, Caldwell, Kujawa and other government officials knew in 1970 and 1971 that Fisher was Gail Miller's murderer. They further alleged that the Saskatoon Police, Caldwell, Kujawa and other government officials took deliberate steps to cover up Fisher's sexual assault convictions to avoid the public embarrassment of having made a mistake in convicting the innocent Milgaard. The allegations were vehemently denied and not substantiated in subsequent official investigations but they persisted and had to be reviewed again in this Inquiry, so the chronology of events relating to Fisher's arrest and conviction is important.

2. Fisher Victim 4 Rape

At approximately 8:25 p.m. on the evening of Saturday, February 21, 1970, Fisher Victim 4 was sexually assaulted by Fisher. Fisher followed her home on the bus and attacked her in the vicinity of Avenue V and 20th Street in Saskatoon. He grabbed her from behind and put his hand over her mouth, tore her coat off and hit her four or five times. FV4 tried to kick him and pull his hair, and she bit his finger. FV4 told police that she thought she would recognize her assailant if she saw him again.

Saskatoon Police investigated the assault and eliminated a number of suspects. Fisher was not identified as a suspect. Police did not connect his earlier assaults with the Fisher Victim 4 rape, nor did they consider any similarities between the Fisher Victim 4 assault and the Gail Miller murder.

3. Fort Garry Sexual Assaults

While working in Winnipeg, Fisher sexually assaulted Fisher Victim 5 in Fort Garry on August 2, 1970. FV5 had finished work at the hospital late at night and was on her way home. Fisher grabbed her from behind and dragged her into the bush. He told her not to scream, bit her on both breasts and sexually assaulted

her. He struck her several times in the face. She tried to fight him off, biting him on the hand and pulling his hair, but he choked her with his arm. Fisher told her to turn over onto her stomach and he then tied her hands and ankles using her stockings and bra. Before leaving he took the money from her wallet.

Late in the evening of September 19, 1970, Fisher, armed with a knife, sexually assaulted Fisher Victim 6 in Fort Garry using her coat to cover her face. Alerted by nearby residents, police caught him in the act and arrested him. He confessed to this, and the August 2, 1970 assault.

Told by Fisher that he had recently moved from Saskatoon, the Fort Garry Police wrote to Saskatoon Police asking if they had any record of him, giving as his last address 120 Adelaide Street, Saskatoon, where he had moved in late 1969. The letter was written "in the hope that it may help to clear up any similar offences that have occurred in your jurisdiction."⁵⁰

Asked by Fort Garry Police about unsolved offences committed in Saskatoon, Fisher at first denied them, but a few days later confessed to two Saskatoon matters, the Fisher Victim 3 and Fisher Victim 4 assaults. Fisher had been befriended by Fort Garry Police officer, Lorne Huff, to whom he confided that he had been beaten by prison guards. Notified by Fort Garry Police of his confessions, Saskatoon Police officers Nordstrum and Karst travelled to Winnipeg on October 22, 1970 to take formal statements. To them, Fisher admitted the Fisher Victim 3 and Fisher Victim 4 assaults, but denied any knowledge of the Fisher Victim 1 and Fisher Victim 2 assaults when asked about them.

Fisher was not questioned about the Gail Miller murder for which Milgaard had been convicted nine months earlier. No investigating officers made the connection at this time or even suspected Fisher as Gail Miller's murderer.

Learning that Fisher had lived in the vicinity of the Fisher Victim 1 and Fisher Victim 2 rapes in 1968, Saskatoon Police questioned Linda Fisher who was then living at her grandmother's house in Saskatoon. Morality Officer Bev Cressman went to Fisher's former address at 512 Avenue F South and interviewed neighbours about Fisher. FV1, FV2 and FV4 were shown photographs of Fisher. FV4 identified him as her assailant, but the other two could not.

4. Larry Fisher Convictions

Police saw similarity between the Fisher Victim 1 and Fisher Victim 2 assaults, and the two to which he had confessed (FV3 and FV4), and on December 30, 1970 charged him with all four. He was not, however, served with a summons to appear, and remained in custody in Winnipeg.

When he was arrested in Fort Garry, Fisher retained Winnipeg counsel Lawrence Greenberg telling him that he wished to plead guilty to all outstanding charges. Unable to have the Manitoba and Saskatchewan charges dealt with by the same Court, Greenberg wrote to the Saskatchewan Attorney General in March of 1971 asking for a plea arrangement to dispose of the Saskatchewan charges. Kenneth MacKay of Saskatchewan Justice was unfamiliar with the charges and contacted Caldwell for information. Caldwell, who had none, passed the request to Deputy Chief of Police Corey in Saskatoon.

Corey summarized the facts for MacKay in a letter dated March 17, 1971, telling him that three of the four sexual assault victims could not identify their assailant and that FV4's identification of Fisher was "extremely weak".⁵¹ In the letter, Corey indicated that Fisher had confessed to the Fisher Victim 3 and

50 Docid 093342.

51 Docid 261053.

Fisher Victim 4 rapes on October 22, 1970 and that he was questioned about the Fisher Victim 1 and Fisher Victim 2 offences but denied any knowledge of them. Further police investigation revealed that Fisher lived within a block of the locations where these rapes occurred (around Avenue F), and because the description of the culprit was similar and the modus operandi was the same in all four cases, they doubted Fisher's claim that he had never heard of these offences.

MacKay told Greenberg by letter March 18, 1971 that because Fisher was in custody in Manitoba, he would have to dispose of the Manitoba charges before dealing with those in Saskatchewan. Fisher plead guilty to his Manitoba charges on May 28, 1971, received 13½ years and was transferred to Prince Albert Penitentiary.

Greenberg reported the disposition of the Manitoba charges to MacKay on June 2, 1971 asking that Fisher's Saskatchewan charges be dealt with as soon as possible. In exchange for guilty pleas to all four charges, the Saskatchewan Attorney General agreed not to seek additional jail time. Kujawa considered 13½ years to be on the high end for such offences in Saskatchewan, and he did not believe a Saskatchewan Court would impose additional time. He was also concerned that if they rejected Fisher's plea arrangement, the Crown might not be able to prove the offences if the matter went to trial. Three of the four victims could not identify Fisher. Kujawa was also concerned that Fisher's confession to two of the four might not have been admissible due to the circumstances of the confession.

In order to expedite Fisher's guilty pleas and avoid unnecessary court appearances by Fisher (who was in the Prince Albert Penitentiary), the Crown and Greenberg agreed to proceed against Fisher by way of direct indictment. This meant that Fisher was saved appearances in Magistrate's Court electing his mode of trial, setting a date for a preliminary inquiry, and then appearing on that date to consent to a committal for trial. Instead, Fisher could be taken directly to the Court of Queen's Bench to enter a guilty plea.

Based upon modern principles of sentencing, the arrangement might, indeed, appear generous on its face because the Saskatoon and Fort Garry offences were widely separated in time and place and should have attracted consecutive, not concurrent time. But the Inquiry heard persuasive evidence that there was good reason for both the guilty pleas in Regina and the consequent sentence of concurrent time.

Kujawa, who handled the matter in Regina and was conversant with Saskatchewan sentences, did not believe that a Saskatchewan court would impose additional time. As well, they relied on Fisher's guilty pleas as proof of the offences. Three of the four victims could not identify Fisher, and Fisher had admitted to two of these offences in Winnipeg after having been beaten in prison, a circumstance which cast some doubt upon the admissibility of the confessions.

Regina as a venue was most convenient for Kujawa, who lived there. Fisher, who was in the Prince Albert Penitentiary, could be brought to Regina on a regular RCMP shuttle.

The Crown intended to proceed in late June, 1971. However, a provincial election was called and the direct indictment had not been signed by the Attorney General of the day. After the election, steps were taken to have the direct indictment signed and the charges proceeded with.

On December 21, 1971, Fisher pled guilty to the four charges, in Regina Court of Queen's Bench, receiving four years on each of the three sexual assaults and six months for the indecent assault, all sentences to be concurrent with the existing sentence from Manitoba. In the result, no additional time was ordered. The proceedings were held in public, and it is not known whether any media were in attendance. There was no report in the Saskatoon or Regina newspaper; however, this was not unusual.

This arrangement caused the Milgaards in later years to suspect Saskatchewan of seizing the opportunity to dispose of Fisher's charges there quietly so as not to draw attention to the similarity between his offences and the Gail Miller murder.

The choice of Regina instead of Saskatoon to receive Fisher's guilty pleas caused more suspicion in the minds of the Milgaards. Guilty pleas are normally heard where the offences were committed and in this case that would mean Saskatoon. Usual procedure would see Fisher face a preliminary inquiry in Saskatoon, committal, and trial in that city. Having elected to plead guilty instead of face trial, usual procedure would still require his appearance in provincial court in Saskatoon, a waiver of the preliminary inquiry, consent to committal for trial, and a guilty plea before the Court of Queen's Bench in Saskatoon.

But a streamlined procedure was available. The Saskatchewan Attorney General could prefer a direct indictment, the effect of which would be to bypass the provincial court and have his guilty pleas heard in Queen's Bench. The preferred location for this would be Regina because Kujawa was handling the matter, he lived in Regina and the Attorney General's office which preferred the indictment was located in Regina. Also, prisoners were regularly transported between Prince Albert and Regina by RCMP aircraft. The arrangement was agreeable to Greenberg who lived in Winnipeg and whose only interest was in expediting the guilty pleas.

The circumstances of the guilty pleas, however, led the Milgaards to allege cover-up in these areas:

1. Kujawa and Caldwell had sufficient information on both the Milgaard and Fisher files and either did or should have connected Fisher to the Miller murder;
2. Saskatoon Police, and in particular Karst, had sufficient knowledge about the Miller murder investigation and the Fisher assaults such that they either did connect or should have connected Fisher to the Miller murder notwithstanding Milgaard's conviction;
3. Saskatchewan Crown officials arranged Fisher's guilty pleas so as to hide them from the public which would then not know that Fisher was Gail Miller's killer. They did this by:
 - a. Proceeding by direct indictment in Regina thereby preventing Fisher from appearing in a Saskatoon Court where the media would have picked up the story and publicized Fisher's conviction.
 - b. Having the proceedings in Regina on December 21, 1971, thus minimizing the possibility of public reporting in Saskatoon of Fisher's convictions.
 - c. Agreeing not to seek extra time in exchange for Fisher's cooperation in pleading to the offences in Regina.
 - d. Not informing Fisher's victims of the disposition of their cases.

The Inquiry heard convincing and innocent explanations for each step leading up to the conviction of Fisher for the Saskatchewan offences. No cover-up was intended in the reception of his guilty pleas in Regina.

I accept the evidence of MacKay, Kujawa and Caldwell already referred to, that in arguing Milgaard's appeal on November 6, 1970 and in dealing with Fisher's guilty pleas on December 21, 1971, Kujawa had only the documents before him which were strictly necessary for the purpose.

For the purposes of the appeal, Kujawa received the trial transcript and copies of relevant exhibits, but not material from the police file. No factums were filed. He argued only the points raised in the Notice of Appeal which did not involve details of the police investigation. The appeal file had no mention of earlier sexual assaults nor the linking of them by police to the murder prior to Milgaard becoming a suspect.

For the purpose of speaking to Fisher's guilty pleas in Regina, Kujawa would have had only the letter from Corey outlining the circumstances of the offences, and the direct indictment. Between the Milgaard appeal and the Fisher guilty pleas, Kujawa would have handled approximately 400 active court files as agent for the Attorney General.

Caldwell had no involvement in the disposition of the Fisher guilty pleas other than to pass on McKay's request to Corey. He had never heard of Fisher and was not involved in laying or prosecuting the charges against Fisher.

Although it was not the practice at the time to inform victims, one of the four victims was informed of Fisher's arrest and conviction.

5. Linda Fisher and Saskatoon Police 1980

Released from prison on mandatory supervision on January 26, 1980 after serving 10 of his 13 year sentence, Fisher sexually assaulted and cut 58 year old Fisher Victim 7's throat in North Battleford, Saskatchewan on March 31, 1980. He was arrested shortly after and charged with rape and attempted murder.

On August 28, 1980, Linda Fisher attended at the Saskatoon Police station at 4:00 a.m. and advised the police that she had suspicions that her ex-husband, Larry Fisher, was responsible for the murder of Gail Miller. She met with Inspector Kenneth Wagner, the senior officer on duty who took a statement from her. She said that she was arguing with Larry on the morning of the murder when a news story came on the radio about it. She then accused Larry of having killed the nurse. Linda Fisher said that she had lost a paring knife around that time and thought that it may have been used by Fisher. She described Larry's reaction to the accusation as being shocked and she went on to describe the missing paring knife as a wooden handled paring knife with rivets. She told the police Larry had never been questioned about the crime and she thought that David Milgaard was innocent.

Fisher's Fort Garry convictions first raised Linda Fisher's suspicions about him as Gail Miller's killer and she confronted him in the Prince Albert Penitentiary in 1971 asking him if he had killed the nurse. Fisher denied any involvement. She continued to have concerns, however, sharing her suspicions with close family members and friends who reassured her that someone had already been convicted for the murder.

Before she went to Saskatoon Police, she had searched in the public library for a picture of the murder weapon used in the Gail Miller case to compare it with her missing paring knife.

On August 22, 1980, just six days before Linda Fisher made her report to Saskatoon Police, David Milgaard escaped from custody while visiting his parents on a temporary absence from Stony Mountain Institution. His escape was reported in the news.

Wagner reported that even though Linda Fisher had been drinking he found her to be coherent and credible. He passed on her statement to the Investigation Division for follow-up. He would later say that he spoke soon after with Detective John Parker who told him that the missing paring knife described by Linda Fisher was quite different than the murder weapon. Parker denies discussing the report with Wagner but in any event Saskatoon Police did not follow-up. Linda Fisher's statement and Wagner's report were placed on the Gail Miller Saskatoon Police investigation file.

I am satisfied that the failure of Saskatoon Police to follow up on her report in 1980 was a decision made in good faith, but it was a mistake. Wagner had reported that although Linda Fisher had been drinking, he

found her to be coherent and credible. The matter of following up such a report should not be left in the discretion of police. There should be a policy requiring referral of such reports to the office of the Director of Public Prosecutions.

Part V – Conviction Review Process

1. Introduction

In the 10 years that followed his conviction, Milgaard and his family concentrated their efforts on obtaining parole. They were unsuccessful. On August 22, 1980, Milgaard escaped while visiting his parents on a temporary absence from Stony Mountain Institution. He was shot and recaptured by the RCMP on November 8, 1980. Milgaard's escape, along with his continued failure to adapt to life in prison, his deteriorating mental state, and his steadfast claims of innocence, persuaded Joyce Milgaard to seek a reopening of her son's case. In December 1980, she issued a news release seeking information to help prove her son's innocence. She offered a \$10,000 reward and began to gather supporters.

Milgaard's only legal recourse to challenge his conviction was to apply to the federal Minister of Justice and seek "the mercy of the Crown". Pursuant to s. 690 (then s. 617) of the *Criminal Code*, the Minister of Justice had the discretionary power to direct a new trial or allow Milgaard another opportunity to appeal his conviction to the Saskatchewan Court of Appeal. Section 690 did not set out the test, the evidentiary onus to be met by Milgaard, or the factors to be considered by the federal Minister in granting a remedy. The decision was a discretionary one, resting solely with the federal Minister, an elected politician. No action could be taken by the federal Minister until a formal application was filed and Milgaard was required to identify the grounds for the remedy sought and the evidence or information he believed was necessary to support his application.

In December 1980, the Milgaard group began investigating Miller's death and Milgaard's conviction, seeking to find evidence to support an application for mercy under s. 690. In the eight years that followed, the Milgaard group interviewed many witnesses and pursued a number of leads. On December 28, 1988, almost 19 years after his conviction, Milgaard made his first application to the federal Minister for a remedy under s. 690.

The application was reviewed and investigated by federal Justice lawyers. On February 27, 1991, federal Minister Kim Campbell denied Milgaard's application. On August 16, 1991 he filed a second s. 690 application. On November 28, 1991, the federal Minister referred the matter to the Supreme Court of Canada for a public hearing and for the Court's advice on whether Milgaard's continued conviction would constitute a miscarriage of justice. After hearing evidence and submissions from Milgaard, Fisher (who was granted status as a party to the Reference), the federal Minister and Saskatchewan Justice, the Court concluded that although Milgaard had not proven his innocence, his continued conviction would constitute a miscarriage of justice unless he was granted a new trial to allow the jury to consider new evidence. The federal Minister set aside Milgaard's conviction, resulting in Milgaard's release from prison, and ordered a new trial. The Saskatchewan Attorney General immediately entered a stay of proceedings.

Although Milgaard's conviction was set aside in April, 1992, the Miller murder investigation was not reopened until July 1997 when semen from Miller's clothing was found to match Fisher's DNA. Saskatchewan Justice then reopened the investigation into Miller's death and charged Fisher with her murder. Fisher was subsequently convicted in 1999.

2. Terms of Reference

The Terms of Reference require the Commission to seek to determine whether the investigation into Gail Miller's death should have been reopened prior to July, 1997 based on information received by Saskatchewan Justice and the police. This necessitated a detailed review of the information received by Saskatchewan Justice and the police, much of which originated from Milgaard's s. 690 applications and the Supreme Court Reference.

Specifically, Saskatchewan Justice received the following information arising from the s. 690 proceedings:

1. Information provided by the Milgaards to the federal Minister in the two s. 690 applications and the Supreme Court Reference.
2. Information generated by federal Justice lawyers and the RCMP in their review of the two Milgaard applications.
3. The decisions of the federal Minister on the two applications.
4. Information disclosed and evidence heard at the Supreme Court Reference.
5. The decision of the Supreme Court in the Reference Case.

Reviewing Milgaard's effort to set aside his conviction and reopen the investigation into Miller's death was a significant aspect of the Commission's mandate. The s. 690 proceedings and the information generated therefrom influenced the decisions of Saskatchewan Justice and the police.

The s. 690 proceedings were also relevant to the Commission's mandate to make recommendations relating to the administration of criminal justice in Saskatchewan, including the prevention, detection and remedying of wrongful convictions.

3. Section 690 Process

The s. 690 process presented a number of challenges for the Milgaards. The remedy was in the absolute discretion of the Minister and a definitive test was not stated nor did one exist. The Milgaards believed, and reasonably so, that proving David's innocence would be sufficient to cause the Minister to exercise her discretion favourably, and so focused their early investigative efforts on establishing David's innocence. Despite their unshakeable belief in innocence, proving it turned out to be a far more difficult and onerous task than anticipated. After filing the first application in December of 1988, the Milgaards were advised by federal Justice lawyers that although proof of innocence was sufficient for a remedy, it was not a prerequisite to a remedy. An applicant needed only to establish a reasonable basis to conclude that a miscarriage of justice likely occurred.

Milgaard bore the burden of determining the grounds of his application and securing compelling evidence to support those grounds. To the extent that his application was based on proving his innocence, Milgaard was responsible to obtain and present compelling evidence proving his innocence.

The s. 690 process was reactive in that on receipt of an application from a convicted person the Minister would limit her review to the specific grounds raised in the application. She would not assist Milgaard in identifying possible grounds nor investigate the conviction on his behalf to identify a basis or evidence to support the application. Her role was to investigate and review what the applicant put forward. There was and is no official agency or institution that could assist a convicted person in gathering information to meet the threshold for the Minister to investigate an alleged wrongful conviction. There was no funding available to Milgaard to hire lawyers and investigators, as Legal Aid in Manitoba and Saskatchewan repeatedly refused requests for funding.

Although Saskatchewan Justice and the Saskatoon Police could have been consulted to undertake or assist with the investigative efforts, the Milgaards did not want to involve the very institutions that investigated and prosecuted David in the first place. They did not trust the people whom they believed responsible for the wrongful conviction.

Part VI – Milgaard Efforts to Gather Information 1981 - 1985

1. Introduction

From 1981 to 1983 Joyce Milgaard and her supporters reviewed the trial record, interviewed witnesses and looked for the real perpetrator. The key witness interviews occurred in the first five months of 1981, and in February and March of 1983. In the latter part of 1983, the Milgaards and their counsel focused their efforts on obtaining parole for David. They were unsuccessful.

There was little activity by the Milgaards in 1984 and 1985. There were no notable witness interviews nor any formal steps taken to file an application with the federal Minister. In 1985 Joyce Milgaard moved to England to pursue training as a Christian Scientist nurse. She told the Inquiry that during 1984 and 1985 “everything was just falling by the wayside and nothing was happening”.⁵²

Very little of the information gathered by Joyce Milgaard between 1981 and 1983 ever found its way to the authorities. Although she provided all of the tapes and witness interview transcripts to her legal counsel, the information was not included in the s. 690 applications submitted to the federal Minister, nor was it disclosed to the federal Minister, Saskatchewan Justice or the Supreme Court as part of the Supreme Court Reference Case in 1992. Eugene Williams, legal counsel for the federal Minister who reviewed the s. 690 applications, first became aware of the transcripts when he testified at the Inquiry in 2006. The information could have been significant in the s. 690 proceedings because the interviews represented the initial post-conviction contact with most witnesses.

2. Milgaard Investigators

(a) Joyce Milgaard

Joyce Milgaard played the lead role in directing the investigation, identifying leads and interviewing witnesses. She testified that while cost was a factor in her decision not to retain an expert investigator, she decided for several reasons to assume this role herself. She told the Inquiry that she felt like a failure as a mother and that she needed to do it herself and to have David see that she “was out there fighting for him”.⁵³ She also believed that as a mother she would be able to convince the witnesses to come forward and tell the truth.

Although determined, she had no experience in questioning witnesses, often putting her version of events to a witness before posing her questions. Understandably, she lacked objectivity. Her investigative technique and approach to the case alienated many of the key witnesses and eventually the authorities as well, who later determined that the information generated by her interviews was unreliable. While the

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information Joyce gathered between 1981 and 1983 was never provided to the authorities until after David was released from prison, information generated from her subsequent witness interviews was publicized and came to the attention of authorities in the course of the s. 690 applications.

She was suspicious from the outset and her inherent distrust of those involved in the investigation and prosecution of her son caused her to reach premature and incorrect conclusions about wrongdoing on the part of the police, the Crown, the witnesses and even David's trial counsel. She secretly tape recorded many of her witness interviews as well as her discussions with legal counsel. Some of these tapes and transcripts were evidence before the Commission. Information she received was often shaped to fit her theory of how and why her son was wrongfully convicted, namely that the police and prosecutors knew him to be innocent but set out to deliberately convict him. Her focus on proving misconduct caused her to spend time pursuing leads that were without merit. Having no legal or investigative experience, she was often unable to appreciate the significance of information that would have been helpful to David's case.

These problems compounded in the early 1990s when the Milgaard group started to disseminate theories and information to the media. While the news reports were always of great interest to the public, they were often incorrect and misleading. Although it may have garnered public support for David Milgaard, the dissemination of misinformation in the media was counter-productive to the efforts to convince the authorities of the merits of his case.

(b) David Milgaard

As a convict, Milgaard was in no position to investigate, but he consistently maintained his innocence and spent much time reviewing transcripts and reflecting upon possible causes for his wrongful conviction. Over time, his recollection of the events of January 1969 faded and, as he admitted, became "influenced"⁵⁴ by what others told him had happened. His most reliable recollection of events at the time is reflected in what he told his counsel Tallis in 1969 in preparing for trial.

In his evidence before the Commission, he acknowledged that his reconstructed memory told him that any incriminating evidence must not have been true but that the one thing that he knew for certain was that he did not kill Gail Miller.

(c) Peter Carlyle-Gordge

In the early 1980s Joyce and David Milgaard received the help of a journalist, Carlyle-Gordge, a freelance writer for MacLeans, who had written on previous wrongful convictions. He was initially interested in writing a book on the Milgaard case, but soon became an advocate and an investigator. He told interviewees that he was writing a book about murders, not wanting to tell them he was really assisting Joyce Milgaard. Carlyle-Gordge was involved with many of the witness interviews in 1981 and 1983 and strategized with the Milgaards and their legal team, then and later. In mid-1983 he moved to England and although he stayed in touch with the Milgaard group he ceased working on the case.

3. Lawyers

(a) Gary Young

Joyce Milgaard retained Young, a Saskatoon lawyer on December 24, 1980. Within days of being retained, Young took the following steps:

- He spoke with Tallis, Milgaard's trial counsel and discussed his representation of Milgaard, and his thoughts on the basis of a remedy. He also made arrangements for Joyce Milgaard to review Tallis' file.
- He obtained a copy of the trial transcript from the Court and asked the registrar to maintain the trial exhibits.
- He arranged to access and review Caldwell's prosecution file.
- He contacted the Saskatoon Chief of Police requesting access to the police investigation file. While Young was initially told the information would not be provided, the Chief later advised that if there were sufficient reasons to cause a review of the case, the police would cooperate by making their file available to a representative of the Attorney General's office.

Young's services were terminated before he was able to make arrangements with the Attorney General's office. Young told the Commission that he believes he would have obtained access to the police file through the Attorney General's office, had he continued to act.

One can only speculate what might have resulted if Young had continued to act and had obtained access to the Saskatoon Police file. Linda Fisher's statement to the Saskatoon Police on August 28, 1980 expressing her suspicions that Larry Fisher killed Gail Miller was on the top of the Miller investigation file and undoubtedly would have been of significant interest to Young. Subsequent counsel for the Milgaards did not pursue access to the police investigation files and the files were not received or reviewed by Milgaard's counsel until late 1991, as part of the disclosure in the Supreme Court Reference.

Before his services were terminated in June 1981, Young provided the Milgaards with a written opinion setting out what was required to obtain a remedy under s. 617 (predecessor to s. 690) of the *Criminal Code*. He advised that it would be necessary to submit evidence of a very strong nature pointing in the direction of Milgaard's innocence. Joyce Milgaard did not ask Young to conduct any witness interviews, instead doing them on her own.

(b) Tony Merchant

In April 1981, David Milgaard's former employer Howard Shannon expressed a desire to help David with his efforts to overturn his conviction. Shannon agreed to provide a retainer of \$3,000 for legal fees provided the Milgaards hired Merchant, a Regina lawyer who Shannon had used on other matters. Shannon believed that Milgaard needed a lawyer with political clout and that Merchant was connected in Ottawa. Joyce Milgaard retained Merchant in April 1981.

On June 25, 1981, Joyce Milgaard notified Young by letter that she was effectively terminating Young's engagement after being persuaded that "we had been zeroing in on the wrong direction, that what was needed, was someone with political connections and clout..."⁵⁵

Merchant acted until his services were terminated in 1985. He told the Commission that his retainer was to get Milgaard out of jail, and he focused much of his efforts towards parole. Merchant believed that if Milgaard was out of jail, he could better assist with efforts to reopen the case and it would take pressure off the family.

Merchant provided general advice to the Milgaards regarding a remedy under s. 617 of the *Criminal Code*, telling them that Milgaard would have to show that he was probably innocent. He cautioned that it was

not sufficient to comb through the trial transcript in an effort to show reasonable doubt. They would need to find "bombshell"⁵⁶ evidence such as a witness recanting. He said had there been something in the transcript justifying acquittal, either Tallis or the Chief Justice would have caught it. It was not a matter of simply re-arguing the case but of finding something significant to convince the Attorney General to reopen.

Merchant was involved in only one witness interview – that of John in May 1981. After the interview, Merchant engaged a psychiatrist to hypnotize John, to assist her with her recollection. John initially agreed but subsequently failed to show up at the interview and avoided further contact with the Milgaards.

Merchant did not review many of the other witness interviews that Joyce Milgaard had conducted. The funds from Shannon were limited so he focused his efforts on other areas of reopening, primarily the parole hearings. Merchant also assisted Joyce Milgaard and Carlyle-Gordge in hiring skip tracing firms to locate witnesses that they wished to interview.

Merchant spoke with Tallis in late 1981 inquiring why Milgaard had not testified at trial, and asking for Tallis' insight on other matters. He learned that Milgaard had definitely been with the friends who testified against him, and that he had admitted to Tallis that on the morning of the murder, he got out with Wilson to push their stuck car and that he, Milgaard, was away from the car for a time. He also told Tallis that he had changed his clothes at Cadrain's house but said that there was no blood on them. He also admitted that he threw a compact out of the car which John had found in the glove compartment. As to the evidence regarding the motel room admission, Milgaard told Tallis that he "could have said it".⁵⁷

4. Motel Room Incident Interviews

Some of the most damning evidence at the trial related to statements made by Milgaard while he acted out the stabbing at a party with friends in a Regina motel room, a number of months after the murder. Milgaard's friends knew he had been questioned by police, and that he was a suspect. A news story about the Miller murder was aired on the television and one of his friends said to Milgaard, as a joke "why don't you admit it? You did it; you know you did it." In response to the chiding, Milgaard started stabbing a pillow with his hand, asking "where is my paring knife?" and stating he had stabbed her 14 times and then she died.

There is no doubt that the incident in the motel room occurred and that Milgaard pretended to stab a pillow uttering words to the effect that he stabbed, raped and killed Miller. Each of his friends in the motel room have slightly different recollections of the precise words Milgaard used. However, they all confirm that Milgaard stated that he stabbed and killed Miller. Milgaard admitted to his trial counsel that he was in the motel room with these people but was so stoned that he could not remember what he said and did. If he said and did what was attributed to him, it would have been a "joke".⁵⁸

Milgaard's actions and words were not perceived as a joke by some of his companions in the motel room, nor by the police, the prosecutor and perhaps not by the jury. Two of the friends testified at trial. After describing Milgaard's actions, Melnyk testified that everyone in the room "just sat there and just sort of

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looked in a daze like".⁵⁹ Lapchuk testified that he was shocked by Milgaard's response and that he sat there "with his jaw hanging down"⁶⁰ and that everyone in the room was looking at Milgaard.

Frank and Hall were also in the motel room but they did not testify. Hall had run away from home and could not be located by the police. Frank would not cooperate with the police and Crown, and was not called to testify as a Crown witness. Frank cooperated with Tallis and told him that the incident in the motel room happened as described by Melnyk and Lapchuk. Frank did not think Milgaard was joking and she took his comments seriously. Tallis chose not to call her, nor did he make any effort to locate Hall, who he assumed would corroborate the evidence of Melnyk and Lapchuk.

Early in 1981, Joyce Milgaard contacted Melnyk and Lapchuk. Both men stood by their evidence at trial and did not provide any information that would suggest there was anything improper about their testimony or the manner in which it was obtained by the police. Joyce commented at the time that the incident was the type of thing David would say as a joke if bugged by his friends and if he was on drugs. Yet in the reopening effort, instead of accepting the trial evidence of Melnyk and Lapchuk as truthful but subject to interpretation, the Milgaards alleged that the incident had not happened and was fabricated by Melnyk and Lapchuk, who lied at trial under police and Crown influence to give false evidence in exchange for a lighter sentence on unrelated charges.

By not accepting that the incident happened and explaining it as a crude joke by a stoned but innocent teenager responding to teasing from his friends, the Milgaards repeatedly and publicly alleged that the incident had not happened. In the result, witnesses were unfairly branded as liars in the media and authorities who dealt with them were unjustly criticized. Hersh Wolch, counsel for Milgaard, was reported as saying that the Crown Prosecutor had paid Melnyk and Lapchuk to give false testimony. All of this caused great resentment amongst police and Crown officials, and served only to diminish the credibility of the reopening effort.

The allegation that the motel incident was fabricated was first made in 1981 and was based upon an interview with Hall conducted by a radio news reporter who was assisting Joyce Milgaard with her witness interviews. Hall was interviewed again in 1986 by a CBC reporter. On the basis of these two interviews, as well as one with David Asper, she provided an affidavit in support of Milgaard's first s. 690 application. The affidavit was quickly discredited by federal Justice lawyers.

In 1981 Chris O'Brien was a news reporter with a Moose Jaw radio station. He was dating a woman who was a friend of David Milgaard's sister, Susan. O'Brien learned about the Milgaards' efforts to reopen, and after meeting Joyce Milgaard, offered his help. Although a news reporter, O'Brien acknowledged that he was acting as an advocate on behalf of the Milgaards. O'Brien told the Commission that he was interested in helping the family but he also saw it as an opportunity to "break a story as every young journalist wants to do".⁶¹

O'Brien had reviewed some of the trial transcripts including the evidence of Melnyk and Lapchuk. Based upon this review and discussions with the Milgaards, he thought that Melnyk and Lapchuk's evidence on the motel room re-enactment was "either exaggerated or wholly fabricated".⁶² O'Brien described his subsequent discovery of Hall to be "serendipitous".⁶³ In early 1981, O'Brien was getting his hair cut by a

59	Docid 002134.
60	Docid 006010.
61	T21148.
62	T21180.
63	T21179.

woman named Deborah Hall. He recalled that a woman by the same name was in the motel room with Milgaard and he asked her whether she knew Milgaard. She did and confirmed that she was in the motel room in 1969 with Milgaard, Lapchuk and Melnyk. Hall was not aware that Milgaard had been convicted, having run away from home shortly after the motel room incident. She also did not know that Lapchuk and Melnyk had testified at Milgaard's trial about the incident in the motel room.

O'Brien told her that Melnyk and Lapchuk testified at trial that Milgaard re-enacted the murder by stabbing a pillow and that he admitted stabbing and killing Miller. Hall told O'Brien that Melnyk and Lapchuk were lying and the incident never happened. This "revelation" obviously piqued O'Brien's interest and he arranged to meet with Hall and conduct a recorded interview.

O'Brien showed her selected portions of Melnyk and Lapchuk's trial evidence and asked for Hall's comment. Hall remembered the news story about Miller coming on the television and she described Milgaard pounding and fluffing his pillow. She "definitely didn't hear" Milgaard saying anything like he "killed her or stabbed her", nor did she hear Milgaard say that he "screwed her in a snowbank." She told O'Brien "I don't remember any conversation like that because I would have remembered that. It would have freaked me right out....I don't recall anything like that. Any kind of a conversation like that. Needless to say, I would have been hysterical if I heard him talk like that".⁶⁴

O'Brien told the Inquiry he was disappointed with the taped conversation because it did not give him the "definitive sound bite".⁶⁵ He thought Hall was less forceful in the taped interview than she had been in the earlier conversation at the salon. However, he came away from the interview believing that Melnyk and Lapchuk had lied at trial and that the re-enactment did not occur. He ran a couple of the "sound bites" on the radio and provided the tape and transcript of the Hall interview to Joyce Milgaard. O'Brien had no further involvement in the Milgaard reopening efforts.

In early 1981, Joyce Milgaard also contacted Robert Harris, who said he was in the motel room when this incident happened. Although he was not called to testify at trial, Harris confirmed Melnyk and Lapchuk's version of events but he said he viewed it as nothing more than a joke.

Based upon her interviews in the early months of 1981, Joyce Milgaard knew that the motel room incident happened as Melnyk and Lapchuk had testified, but it was a matter of interpretation whether David was joking or not. Furthermore, there was nothing improper about how Melnyk and Lapchuk were discovered by the police or how they came to give their evidence at trial.

5. Ron Wilson Interviews

Joyce Milgaard telephoned Wilson on January 26 and April 15, 1981, secretly recording both conversations. The tapes and transcripts of the call were evidence before the Commission. The January call was the first post-conviction contact Wilson had with the Milgaards. Wilson told Joyce Milgaard that he would help as much as he could although he was unaware of John's testimony at trial and had not spoken to either John or Milgaard since.

Having reviewed some of his preliminary and trial evidence, Joyce Milgaard asked Wilson about some of his testimony. Contrary to what he had said at trial, he was quite certain that he, John and Milgaard were

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Docid 178010.
T21182.

stoned and smoked dope on the way to Saskatoon on the morning of the murder and that he could not recall having seen blood on Milgaard's clothing.

More than once he had to ask Joyce Milgaard what his testimony had been at trial. He recalled that the woman they stopped for directions wore a white uniform and a black cape.

Wilson had little negative to say about the police questioning other than about the lie detector test. Joyce Milgaard suggested to Wilson that the police tried to put words in his mouth and asked whether the police offered to make a deal with him if he co-operated. Wilson denied both suggestions and said the police never threatened him, nor told him what to say. He commented that he was pressured a bit but not to the point that he would convict Milgaard. Asked if he honestly believed that Milgaard had committed the crime, he said that he did not know, but doubted that he had been gone from the car long enough.

He complained about the lie detector test and the way Roberts had administered it, telling Joyce Milgaard that before the test his mind was blank (he had a "mental block or whatever"⁶⁶), but after he took the lie detector test things started to come back.

After discussing his concerns about the lie detector test, Wilson encouraged Joyce to "go for a new trial".⁶⁷ He said that it was possible that he and the other "stoned people"⁶⁸ got it into their heads that Milgaard had committed the crime. He said he was now totally confused.

Wilson asked to review the trial transcripts to see if he could identify any discrepancies. Joyce told him she would get the transcripts for him, and Wilson agreed to meet with her.

After the April 15, 1981 telephone call, however, there was no further contact with Wilson by Joyce Milgaard or anyone on her behalf until June 1990 when Paul Henderson of Centurion Ministries contacted Wilson.

Joyce Milgaard told the Inquiry she did not think she had gotten anything of benefit from her 1981 interviews with Wilson and therefore did not pursue him further.

6. Nichol John Interview

Joyce Milgaard's first effort to interview John was rebuffed in January 1981, but on February 26, 1981, Joyce Milgaard wrote a letter to John promising that she had very important new information which would explain what really happened in 1969. John retained a lawyer and arrangements were made for Joyce Milgaard and Merchant to interview her. The interview took place on May 9, 1981 and was recorded with the consent of John and her counsel.

During much of the interview, Joyce Milgaard told John what she thought happened on the morning of January 31, 1969 and how all of the evidence against her son could be explained.

John's recollection of events was poor. She could not remember seeing a knife on Milgaard on the trip. She said she thought they were on drugs on the trip to Saskatoon, and she remembered stopping the woman for directions recalling that she was young and wearing white. She remembered their vehicle getting stuck and Milgaard and Wilson leaving the car to get help. She remembered seeing a church at the end of an alley and she recalled Milgaard throwing a compact out of the car after leaving Saskatoon.

66 Docid 046588.

67 Docid 177468.

68 Docid 177468.

John could not recall seeing Milgaard stab a woman or grab her purse, nor could she recollect having told that to police in her May 24, 1969 statement which followed an interview with polygrapher Roberts.

Joyce Milgaard then suggested to John that she had been taken to a cell, left alone, became hysterical and called a woman officer who put a mattress down on the floor in the cell for her. John could not remember that. It was then suggested to John that she was kept in cells overnight and then driven around and brought back to cells whereupon she gave the statement incriminating Milgaard. John could not remember that either. Joyce Milgaard remarked that John must really have blanked out a lot of things. John told her that she did not think she had been frightened by the police, who treated her very well.

John's treatment by the police in the cells became an issue later in the reopening. There was no evidence before the Commission to suggest that John was mistreated by the police in the cells or that she was "hysterical".⁶⁹ The origin of this story appears to be Joyce Milgaard's interview where she told John her impression of what happened.

At Milgaard's trial, Tallis cross-examined John extensively about her overnight stay at the police station. John testified that she was initially placed in a cell for "about two minutes",⁷⁰ but complained and was moved into the matron's room opposite the cells. John testified that something happened while she was in the cell and she called the matron by banging on the door, and the matron brought her aspirin and stayed with her for a while. John said that she didn't get much sleep on the night of May 23 and that she was unhappy about being kept in the cell block area.

The new information promised by Joyce Milgaard concerned her theory that one Lorne Mahar had killed Gail Miller. Mahar had been charged with killing his wife in the summer of 1969 after having visited the priest at St. Mary's Church. There was no other evidence to suggest that Mahar was or could have been Miller's killer. Joyce Milgaard explained to John that she "could have seen the real murderer [Mahar] doing this". John replied that she knew something happened, she knew that she saw something but she did not know what she saw.

Expanding on her theory, Joyce Milgaard suggested that Mahar raped Miller in his car parked near the T-intersection of the alley ahead of the Wilson vehicle. After putting her coat back on and leaving the car, Mahar chased Miller and John mistook him for David Milgaard. She showed John a map of the back alley and the crime scene. John listened to this but did not respond.

John told Joyce Milgaard that David had raped her in a hotel room in Regina. In general, she was upset with Joyce Milgaard's approaches to her and refused further contact, including an effort to have her undergo hypnosis.

7. Father Murphy

In February 1981 and again in February of 1983, Peter Carlyle-Gordge had discussions with Father Murphy, the parish priest at St. Mary's Church at the time of Miller's murder. Carlyle-Gordge initially contacted Father Murphy to talk about the Mahar murder. In the course of their discussions, Father Murphy advised Carlyle-Gordge that he had contacted Albert Cadrain at the request of an acquaintance and told him to go in to the Saskatoon Police to claim the reward in relation to the Miller murder. In the

69 DocId 048643.
70 DocId 003049.

1981 interviews, Carlyle-Gordge concluded that it was Father Murphy who caused Cadrain to go to the Saskatoon Police on March 2, 1969 to give his initial statement.

On February 21, 1983 Carlyle-Gordge talked to Father Murphy again to clarify his involvement and was told unequivocally that he did not contact Cadrain until after Milgaard's conviction, and then only to suggest that he apply for the reward. Clearly, Father Murphy had no part in Cadrain's decision to go to the police on March 2, 1969, nor did he have any contact with Cadrain prior to Milgaard's conviction.

8. T.D.R. Caldwell

Under the guise of an author writing a book on western Canada murders, Carlyle-Gordge obtained an interview with Caldwell in February of 1983 and received access to the prosecution file where he noted a police report of a February 3, 1969 interview with Larry Fisher of 334 Avenue O South.

He met with Caldwell again in March of 1983 and was given an overview of the police investigation and prosecution, including names of various officers and Caldwell's perspective of other witnesses.

9. Albert Cadrain

The efforts of Joyce Milgaard and Carlyle-Gordge to locate and interview Cadrain early in 1981 were unsuccessful. Cadrain's mother, Estelle Cadrain, would not reveal his whereabouts.

Early in 1983, however, Carlyle-Gordge found him and again pretending that he was writing a book on the Miller case, Cadrain agreed to an interview, a recording of which was provided to the Commission.

Cadrain confirmed his trial evidence and told Carlyle-Gordge that he saw blood on Milgaard's pants when Milgaard arrived at his house on the morning of the murder. He also confirmed that Milgaard threw a compact out of the car after leaving Saskatoon. Carlyle-Gordge asked about his treatment by the police, Cadrain said at first that he was not believed and was put through the mill and police even accused him of being involved in the crime.

Although embellishing his recollection of certain other matters, Cadrain remained adamant that he saw blood on Milgaard's pants.

10. Investigation of Larry Fisher

Having enjoyed little or no success with the main Crown witnesses, Wilson, Cadrain and John, Carlyle-Gordge and Joyce Milgaard turned their attentions to Fisher as a suspect, having learned in February of 1983 that he lived in the basement of the Cadrain house with his wife and infant daughter at the time of Gail Miller's murder. He had been convicted of rapes and was in prison so they looked for his wife Linda. She contacted them in March 1983, but they did not follow it up, for reasons which they could not explain to the Inquiry.

Carlyle-Gordge's interest in Fisher stemmed from a telephone conversation he had with Dennis Cadrain on February 21, 1983 following Carlyle-Gordge's interview of Albert Cadrain. Carlyle-Gordge went back to Albert hearing from him that Fisher was "a real gangster type" and a "real weirdo" who had been caught years later for rapes.

At the request of Joyce Milgaard and Carlyle-Gordge, Merchant hired an investigator to locate Linda Fisher. He was successful. Carlyle-Gordge advertised in the Saskatoon StarPhoenix in March, 1983:

H	cluded. Call: Skyway Balloon Pro- motions 934-0585, 955-1166.	DONUTS OPEN SUNDAY 1 Ave. W. & 22nd St
E	LINDA FISHER - Would anyone knowing the recent whereabouts of Linda Fisher (who was married in 1969 to Larry Fisher) and has a daughter, Tammy, please contact Box 410 C, Star Phoenix. The ad- vertiser has important information which may be to her advantage and is anxious to contact Mrs. Fisher as soon as possible. Her last known ad- dress was in Saskatoon.	
scorts		LAUNDRY
ondes		WI
		HUMPHREYS (
		514 - 33rd Phone
		Sunday Hours 7-

The advertisement ran for a week commencing on March 26, 1983. Linda Fisher and her common-law husband, Bryan Wright replied separately to the classified ad. On March 27, 1983, Linda Fisher wrote a letter to the box number and provided her address in Cando, Saskatchewan where she could be contacted. Wright wrote a letter advising that he was Linda's common-law husband and she could be contacted through him, providing his telephone number in Saskatoon. Both letters were received by Carlyle-Gordge and provided to Joyce Milgaard at the time. Linda's home phone number is written on her letter in Joyce Milgaard's handwriting and there are also handwritten notes of directions to the town of Cando.

Linda Fisher and Wright told the Inquiry that although they were prepared to cooperate with the Milgaards and that Linda would have shared her suspicions about Larry Fisher as Gail Miller's killer, they received no reply to their letters.

Had Linda Fisher been interviewed in 1983, and had Saskatchewan Justice been told about it, it might well have led to the reopening of the investigation into the death of Gail Miller.

Carlyle-Gordge explained to the Inquiry that he was not seeking Fisher as a suspect in 1983 but rather wanted only to know if Larry or Linda Fisher saw anything on the day Milgaard arrived at the Cadrain house. "Larry Fisher was not, in my mind anyway, a serious suspect",⁷² said Carlyle-Gordge.

For her part, Joyce Milgaard professed surprise at the Inquiry when presented with the documents detailing her efforts to locate Fisher. In fact, she had provided the documents to the Commission and she knew in 1983 that Fisher, a convicted rapist, lived in the basement of the Cadrain house at the time of the Miller murder.

Other evidence before the Inquiry confirms that Carlyle-Gordge and Joyce Milgaard were pursuing Fisher as a suspect. Carlyle-Gordge's handwritten notes were found on an August 20, 1969 file memorandum prepared by Tallis. Joyce had obtained the memo from Tallis' file in 1981. Tallis outlined his observations of the Cadrain house and the scene of the murder, including reference to a burning barrel in the Cadrain's backyard. Carlyle-Gordge wrote "Fisher?"⁷³ next to this reference.

71 Docid 159890.
72 T21560.
73 Docid 224933.

In a memorandum he prepared before trial, Tallis made reference to John's May 24 statement where she claimed to see Milgaard grab a girl and stab her, and he noted that it was difficult to reconcile this observation with the fact that Miller's dress had no knife punctures and must have been removed before the stabbing. Carlyle-Gordge wrote a note on Tallis' memo stating that "she was likely raped in car with dress pulled down. She then pulled coat around and tried to run and killer caught her and stabbed her... check cars: Fisher. Mahar".⁷⁴ Carlyle-Gordge's notes were written in 1983.

Both Carlyle-Gordge and Joyce confirmed that information collected by each of them was shared with the other. There was other evidence confirming that Joyce Milgaard was aware of Fisher in 1983. In 1990, when Fisher's name was provided to the Milgaards by an anonymous tip, Joyce was able to locate Linda using information she remembered from Carlyle-Gordge's 1983 interview of Mrs. Cadrain.

Despite the reluctance of Carlyle-Gordge and Joyce Milgaard to acknowledge at the Inquiry that their 1983 interest in Fisher as a suspect for the Gail Miller murder was important, but not pursued, there is no question that it was significant information which would have been of interest to Saskatchewan Justice, as well as Justice Canada, had an application for mercy been made at that time.

After discovering Fisher for a second time in 1990 through an anonymous tipster, the Milgaards took the position that the presence of a convicted rapist living in the basement of the Cadrain house at the time of the murder was enough in itself to set aside Milgaard's conviction.

The same information Joyce Milgaard had in 1983 about Fisher was provided to Wolch in 1986 but was not made a part of the s. 690 application filed with the federal Minister in 1988, having either been ignored or its significance missed.

11. Raymond Mackie

Through the good offices of Caldwell, Carlyle-Gordge was able to interview Mackie in March of 1983. Mackie could not recall Fisher when Carlyle-Gordge asked if he had been questioned by police. Mackie believed that John had a psychological block and had seen more than she was able to say.

12. Other Interviews

Joyce Milgaard and Carlyle-Gordge also interviewed a number of other people who were witnesses at the trial including Walter and Sandra Danchuk, Robert Rasmussen, Adeline Nyczai, Dennis Elliott, Shirley Wilson and Leonard Gorgchuk. Little or no use was made of information gathered by Carlyle-Gordge and Joyce Milgaard when it came time to file the first application for mercy to Justice Canada in 1988.

13. Fifth Estate

Early in the reopening effort, the Milgaard group sought publicity for David's cause in an effort to sway authorities, gain public support, and perhaps generate information through investigative journalists and others.

In 1985, they approached the producers of the CBC Fifth Estate program giving them all the written interviews conducted by Joyce Milgaard and Carlyle-Gordge from 1981 to 1983, as well as information regarding Fisher. The CBC appointed a researcher, Sandra Bartlett, to review the transcripts. She also conducted some of her own taped interviews including an interview of Hall.

Consideration was given to a documentary about Milgaard's claims of innocence, and in September of 1985, CBC told Joyce Milgaard that they would do a story focusing on her efforts to get a new trial for her son. Although some segments were filmed, by the spring of 1986 the show had not aired and the Milgaards were becoming frustrated with the failure of CBC to run the program. They suspected that Merchant had caused the program to be cut. In fact, it was not aired because the CBC could not find convincing evidence of Milgaard's innocence.

David Milgaard asked for all of the CBC's investigative work but on April 13, 1987 they responded:

The filming and research on your case was done by the Fifth Estate with only one purpose in mind: to produce a television documentary which would demonstrate clearly that you had been unjustly convicted in the murder of Gail Miller. Unfortunately, although we did our best, we failed to come up with the information we believe necessary to complete the documentary. In making this admission I am not passing judgement on you; I am saying only that our failure to get the hoped-for information meant that we could not proceed with a documentary that would clearly demonstrate your innocence. Because of this failure, we were stymied. And we remain so to this day.

However, at no time did we ever consider that the material we were collecting would become part of the evidence submitted by your lawyer at the ministerial presentation. As I have said, CBC policy would forbid us to do this. There is an additional problem. Our information is incomplete; some of it may even be harmful to your cause. And as professional journalists we would not want our information used in a selective way by any lawyer. I make this point only to emphasize that our work was done to produce a documentary film, not to compile evidence for ministerial presentation.

Having gone on at length as to why we cannot pass our material on to you, I would like to add that in my opinion we have gathered no more information than that collected by your mother and Peter Carlyle-Gordge...⁷⁵

As mentioned, the information gathered by Joyce Milgaard and Carlyle-Gordge was not used in support of the December 1988 application for mercy although it would have assisted federal investigators dealing with the application. The Milgaard group continued to favour media exposure over disclosure to officials, of information they gathered during the reopening effort.

In 1990, when information came to light about Fisher, the CBC finally ran a program about David Milgaard on the Fifth Estate.

Part VII – Preparation and Filing of First Application 1985 - 1988

1. Retainer of Hersh Wolch

In September 1985, Joyce Milgaard terminated Merchant as David's lawyer. She told the Inquiry that in 1985 she learned that Colin Thatcher knew Miller and had dated her around the time of her death. She

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Docid 224987.

suspected that Thatcher, who had been convicted of murdering his ex-wife, had also murdered Miller. Merchant was Thatcher's long time lawyer, and Joyce suspected he was using his representation of Milgaard to determine whether the Milgaards had any information incriminating Thatcher. In addition to those suspicions, Joyce and David Milgaard also had some concern that Merchant may have used his relationship with Eric Malling of the CBC to cause the CBC not to air a show on David's case on the Fifth Estate. None of this was true.

In the fall of 1985, Joyce Milgaard retained Winnipeg lawyer Wolch to assist her son with an application for mercy to the federal Minister of Justice. Wolch had been recommended by Carlyle-Gordge.

Joyce Milgaard had spent the previous five years interviewing witnesses, following leads and gathering information to support an application to the federal Minister. Joyce Milgaard and Carlyle-Gordge had interviewed all of the key trial witnesses. Carlyle-Gordge had interviewed the prosecutor and obtained access to his file, and had also interviewed officer Mackie. Efforts to obtain the Saskatoon Police investigation file were not pursued after Young was terminated as counsel in June 1981. Milgaard's defence counsel at trial, Tallis, had provided access to his file and had spoken to both Young and Merchant, providing his perspective on Milgaard's trial and possible grounds for reopening. The Milgaards also knew that Fisher, a convicted rapist, lived in the basement of the Cadrain house at the time of Miller's murder.

Despite this effort, an application to the federal Minister had neither been prepared nor filed. In fact, no contact had been made with the federal Minister by anyone on behalf of Milgaard suggesting that an application would be forthcoming.

Joyce Milgaard told the Inquiry that she believed she had gathered sufficient information to support an application to the Minister and she asked Wolch to review it thinking that "he would have the wisdom to see through all the stuff that I had and see what was relevant. He would know what was relevant what wasn't and he could head me in the right direction."⁷⁶ She wanted Wolch to tell her whether she had enough information for an application and if not, what more she needed and how best to proceed with an application to the Minister.

She confirmed the terms of Wolch's retainer in a letter dated January 16, 1986:

I have met with David and discussed our interview together.

We both feel it is important that you & he have a meeting as soon as possible. At that time the decision can be made, if you are both in agreement, to go ahead on the basis we discussed. My understanding of this was \$2,000.00 (or less) would cover the visit with David, and the perusal of all transcripts, documents, research data that Peter will provide, and a final meeting providing us with your conclusions and opinions on how to proceed further.

I shall write to Peter and ask him to bring everything with him and see that it gets to you.⁷⁷

Although it was some time before Wolch personally met David, the \$2,000 retainer was paid and Joyce and Carlyle-Gordge provided Wolch with all of the documents and information they had gathered, including preliminary hearing and trial transcripts, all of the tapes and transcripts of their interviews with

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Docid 213127.

witnesses, and the documents relating to their efforts to locate Larry and Linda Fisher. The Milgaards expected that an application could be filed immediately based on the information they had gathered and were anxious to proceed. The application was filed on December 28, 1988, three years after Wolch was retained.

2. Initial Contact with Federal Justice

On January 28, 1986, David Milgaard wrote to the federal Minister advising that he was going on a hunger strike and that his case would be aired on the Fifth Estate. The letter represented the first contact by David Milgaard or anyone on his behalf with the federal Minister's office. In March 1986, the federal Department of Justice replied advising Milgaard that he should make an application to the Minister for relief under s. 617 of the *Criminal Code* and setting out the materials that needed to be submitted with an application.

On April 2, 1986, Milgaard replied advising that he knew how to proceed legally and that he had retained Wolch to assist him. The federal Department of Justice opened a file in anticipation of the application and replied to Milgaard on May 28, 1986, indicating that they were looking forward to receiving Wolch's application for mercy.

Wolch knew senior federal Justice lawyers who were involved in reviewing claims under s. 617 and he had informal discussions with them to determine what was required to be included in an application. Wolch was told that they needed to find something new that had not been considered by the jury that would tend to show a miscarriage of justice.

3. Steps Taken by Hersh Wolch and David Asper

According to Joyce Milgaard's evidence at the Inquiry, Wolch never did review the materials she and Carlyle-Gordge provided to him in 1986, instead handing them to his articling student Asper, who had joined Wolch's firm in March 1986.

At their first meeting in April 1986, Milgaard told Asper that at the time of his trial the Crown had a statement from Hall which said the motel room re-enactment had not happened. This information came from O'Brien's 1981 interview of Hall. Milgaard also told Asper that he was not a secretor and therefore the frozen semen found near the body could not be his. Tallis had presented this argument to the jury at Milgaard's trial. These two allegations became the basis of Milgaard's first s. 690 application which was filed two and a half years later.

After reviewing the trial transcripts and meeting with Milgaard, Asper became convinced of his innocence. He told the Inquiry that the Crown's case looked implausible to him and that Milgaard had been convicted based upon the lies of his five friends, all of whom were "unsavoury witnesses"⁷⁸ (Wilson, John, Cadrain, Melnyk and Lapchuk).

In the months that followed, Asper did most of the work on the file, keeping Wolch advised of progress. When it came to determining the grounds of the application, Wolch made the decision on what was to be included.

(a) Deborah Hall Affidavit

On August 11, 1986, Asper received information on the motel room incident from Sandra Bartlett, a researcher with the CBC Fifth Estate. As part of their efforts to have the Fifth Estate produce a documentary about Milgaard, the Milgaards provided Bartlett with their witness interviews including Chris O'Brien's 1981 interview of Hall. Hall had been interviewed for the anticipated Fifth Estate program.

Bartlett told Asper that Hall was present in the "hotel room in Calgary"⁷⁹ when Milgaard allegedly went through the stabbing motions and that Hall was prepared to swear that Milgaard did no such thing. Bartlett also told Asper that she discovered that the two witnesses who did testify (Melnik and Lapchuk) made sweetheart deals with the Crown in return for their evidence. None of this was true.

In November 1986, Asper telephoned Hall in Regina and asked if she would swear an affidavit to support Milgaard's application for mercy. Hall confirmed that she was in the motel room with Milgaard, Melnik, Lapchuk and others in the spring of 1969. She gave her recollection of the evening to Asper. Based upon the telephone interview, Asper drafted an affidavit and attended in Regina a few days later to have Hall sign the affidavit.

In the affidavit, Hall deposed that approximately five years earlier, a radio reporter named O'Brien had informed her that Milgaard had been convicted and that Melnik and Lapchuk had given certain evidence at the trial. She said that prior to that she was not aware of Milgaard's conviction stating that she never discussed the evidence in her affidavit with the police and no one ever asked her to swear to the truth.

She described Milgaard's conduct in the motel room as follows:

IN THE MATTER OF: An application to the Minister of Justice
pursuant to Section 617 of The Criminal
Code of Canada.

HER MAJESTY THE QUEEN,

VS.

DAVID E. MILGAARD,

Applicant.

AFFIDAVIT OF DEBORAH HULL *HULL*

SWORN THIS 23RD DAY OF NOVEMBER, 1986. *21/4*

I, Deborah Hull, of the City of Regina, in the Province
of Saskatchewan, **MAKE OATH AND SAY:**

1. THAT I am the above-named deponent and as such have
personal knowledge of the matters hereinafter deposed to by me
except where same are expressed to be founded upon information
and belief.

2. THAT I was born in the City of Ottawa, in the Province
of Ontario on April 22nd, 1952 and am 34 years of age.

3. THAT I currently reside at 22 - 39 Centennial Street
in the City of Regina, in the Province of Saskatchewan with my
15 year old son. I am a single parent.

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4. THAT I am employed as a men's hairstylist at Rudy's Hairstyling which is located in the City of Regina, and I have worked there for 8 years.

5. THAT I have material information relating to the case of David Milgaard that was not known to the various courts which adjudicated this case.

6. THAT I was living in Regina with my mother, step-father and younger brothers and sisters at the time of the commission of the murder of Gail Miller in Saskatoon.

7. THAT approximately 5 years ago a radio reporter named Chris O'Brien informed me that David Milgaard had been convicted of the murder of Gail Miller and that two witnesses, namely, George Lapchuk and Craig Melnyk had given certain evidence at the trial.

8. THAT until so informed by Chris O'Brien I had no knowledge whatsoever that David Milgaard had been convicted. I recall shortly after seeing David Milgaard in late May of 1969 that Ute Frank told me that David Milgaard had been arrested but I did not believe her.

9. THAT until Chris O'Brien showed me the transcript of the evidence of George Lapchuck and Craig Melnyk I had no idea that they had so testified.

10. THAT as soon as I read the evidence of George Lapchuck and Craig Melnyk I immediately remembered the evening in question and was shocked at how it was described by them.

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11. THAT I have never discussed the evidence contained in this my affidavit with the police and no one has ever asked me to swear to the truth and I am eager to do so now.

12. THAT I am able to remember the events on the evening in question because that night was the first time I had taken what I considered to be a strong drug. I ingested what I believed to be a tablet of THC, which I was advised at the time was some kind of synthetic marijuana.

13. THAT the taking of this drug did not effect my memory and in fact it seemed to make the events much clearer in my mind.

14. THAT my recollection of what happened in the latter part of May, 1969 is as follows:

Ute Frank and I were friends at the time and on the evening in question we met David Milgaard early in the evening at Victoria Park in the City of Regina. I remember that George Lapchuk was hanging around there as well. We took a taxi to a location that I remember as being at 15th Street and Scarth Street in the City of Regina where we met a person who provided us with money to buy drugs on his behalf. We then went to see another person to purchase the drugs. From there, we went in the taxi to the Park Lane Motel. My recollection is that David Milgaard had never intended to give these drugs to the person from whom we had received the money.

When we arrived at the Park Lane Motel, we went to a room that David Milgaard had rented. I remember

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that it was a room near the end of the L-shaped building on the north side of the parking lot. On our way to the motel I took the tablet of THC.

By the time we arrived at the motel the three of us were fairly well under the influence of the drugs.

A short time after arriving at the motel, George Lapchuk and Craig Melnyk appeared. I did not know Craig Melnyk although I had seen him hanging around Victoria Park and at the Balmoral Cafe in Regina. Bob Harris also arrived at the motel room a short time after we arrived.

George Lapchuk and Craig Melnyk did not parttake of the drugs that we had purchased and I do not know whether they were under the influence of drugs or not. Bob Harris took some kind of drug in the hotel room and it made him very impaired. I remember this very clearly because it was the first time that I had seen someone use a needle to inject drugs. I can very clearly recall seeing his head go back and hit the wall and his eyes roll in his head after he put the needle in his arm.

I remember that the television set in the room was on but that no one was really watching it. The volume was quite low and in order to hear it one had to be specifically concentrating on the television set. There was a party atmosphere in the room and I recall that everyone was engaged in lively conversation.

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George Lapchuk and Craig Melnyk were sitting by the television set. David Milgaard was lying on the bed with his head against the head-board, Ute Frank was also on the bed and I was sitting in a chair beside Bob Harris.

I remember seeing news pictures of the Gail Miller murder on the television set but could not hear what was being said. As I previously indicated, everyone in the room was chattering back and forth. At one point Craig Melnyk said to David Milgaard "you did it didn't you?". As Craig Melnyk was saying this, David Milgaard was punching the pillow trying to fluff it up. I remember him saying, in response to Craig Melnyk, "oh yeah right." in a sarcastic or joking manner. David Milgaard then put the pillow back against the head-board and leaned back and crossed his arms against his chest. I believe his response to the comment made by Craig Melnyk was in a joking manner. At no time did David Milgaard use the pillow to re-enact the murder. My interpretation of David Milgaard's response was that it was a completely innocent and perhaps crudely comical comment. I know that if I had thought he was serious I would have left immediately. No one in the room thought anything of that particular conversation.

Craig Melnyk and George Lapchuk both lied when they stated in their evidence at trial that David Milgaard re-enacted the murder by going through a series of stabbing motions against the pillow. Also, I am advised that George Lapchuk said at the

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trial that he had driven me home that night but, the truth is that I lived approximately 4 blocks from the motel and walked home.

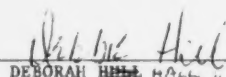
15. THAT I have not seen David Milgaard since that evening at the Park Lane Motel and am very concerned that the evidence of George Lapchuk and Craig Melnyk helped to convict David Milgaard.

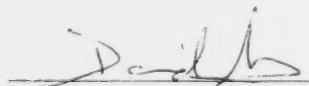
16. THAT approximately two weeks after the evening at the Park Lane Motel I ran away from home. I headed to Toronto and stayed there for a couple of weeks and then moved onto Montreal. There my natural father caught up with me and convinced me to move to the town of Nelson, in British Columbia, with him.

17. THAT thereafter I never heard anything more of the case until Chris O'Brien spoke with me approximately 5 years ago.

18. THAT I make this affidavit bona fide and in support of an application by David Milgaard under Section 617 of The Criminal Code of Canada to have the Minister of Justice direct that a new hearing be held.

SWORN before me at the)
City of Regina, in the)
Province of Saskatchewan)
this 23rd day of November, 1986.)


DEBORAH HILL, HALL, HILL, HILL
DH
DP



A BARRISTER-AT-LAW ENTITLED TO
PRACTICE WITHIN THE PROVINCE OF MANITOBA

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The Milgaards and their counsel believed they had evidence to establish that the motel room re-enactment did not happen and that Melnyk and Lapchuk lied at trial.

(b) David Milgaard Affidavit

On November 25, 1986, Asper prepared an affidavit, sworn by Milgaard. In it, Milgaard denied ever admitting that he had committed the offense, denied having blood on his clothes that day, or throwing a woman's compact out of the car, or re-enacting the crime in a hotel room in Regina in May 1969.

The Hall and Milgaard affidavits were filed by Wolch with the National Parole Board on November 26, 1986, in support of Milgaard's application for parole. Wolch said that he was preparing an application to the federal Minister to have the case reopened under s. 617 of the *Criminal Code* and that "[t]he final brief we intend to file with the Minister of Justice is in its final stages of preparation and we anticipate having it completed before Christmas."⁸¹

Asper told the Inquiry that Wolch did not think that the Hall affidavit was sufficient to support an application to the Minister and so they continued to look for other grounds.

(c) Dr. James Ferris' Report

In February of 1987, Joyce Milgaard read media reports about the use of DNA testing in criminal cases. She became aware of Ferris, a Vancouver forensic pathologist who was conducting a DNA research study. She contacted him and asked if he could test the original Miller trial exhibits and compare the semen stains to David's DNA profile. Ferris agreed, but cautioned her that DNA testing was new science and that it might not be possible to extract DNA from an 18 year old exhibit. Ferris asked that the Miller exhibits be sent to him. He told the Commission that he was not an acknowledged DNA expert at the time, but was simply doing DNA lab work.

In May 1987, Asper left Wolch's firm and the practise of law to work for his family's television business. The file was turned back to Wolch and little was done. In September of 1987, Asper received a letter from the Milgaards:

We decided you might like to be up-dated as to what has been happening. It is not too difficult. It can be put in one word. Nothing.

...

David has had his high days and low days as have I since things seem to be standing still.⁸²

Asper testified that while his desire was to stay in business, he was troubled by this letter. He felt guilty and he eventually returned to Wolch's firm in May 1988 to "finish what I had started".⁸³

Wolch obtained the Miller exhibits from the Court in January 1988 and sent them to Ferris in Vancouver along with copies of RCMP lab reports and transcripts from various witnesses at the preliminary hearing and trial.

81 Docid 213821.
82 Docid 162412.
83 T25531.

In February of 1988, Ferris told Joyce that his efforts to obtain DNA from Gail Miller's clothing did not produce sufficient DNA to allow for comparison typing. A portion of the panties was destroyed in the process. Ferris did not prepare a written report on his DNA extraction efforts, but offered to review the forensic trial evidence to see if he might find some basis to reopen the case. Joyce Milgaard agreed and Ferris reviewed the transcripts and lab reports. Ferris did not, however, have the complete trial record. In particular, he did not have Caldwell and Tallis' closing submissions to the jury, and thus had no idea what submissions were made about the forensic evidence.

Ferris provided Wolch with a written report dated September 13, 1988, that focused on the forensic value of the frozen semen found in the snow near Miller's body. He expressed concerns about the integrity of the sample and its handling, and was surprised that it was ruled admissible in light of likely contamination.

Still, he interpreted the secretor evidence, assuming that Milgaard was blood type A and a non-secretor. The semen containing type A antigens, he said, likely came from an individual who was of blood type A and a secretor, thereby excluding Milgaard. He acknowledged that the semen could have come from a non-secretor if it had been contaminated with antigens from his blood. But any blood in the semen was likely Miller's. There was no evidence that Milgaard was suffering from any bleeding injury. Without evidence of his blood, the semen could not be linked with him.

Ferris concluded that:

On the basis of the evidence that I have examined, I have no reasonable doubt that serological evidence presented at the trial failed to link David Milgaard with the offence and that in fact, could be reasonably considered to exclude him from being the perpetrator of the murder.⁸⁴

Had Wolch spoken to Tallis he would have learned that Ferris was simply restating Tallis' submission to the jury. As Tallis told the Inquiry, he viewed the semen evidence as exculpatory, excluding Milgaard as the perpetrator. He believed that the Crown viewed it in the same light but argued that the possible presence of blood in the semen meant that it could have come from a non-secretor who bled into his semen. Milgaard could have been one of the thousands of possible donors.

Tallis did not object to the admissibility of the semen on grounds of contamination because he viewed it as being exculpatory – favourable to Milgaard's defence. He told the jury that the frozen semen exculpated his client because he was a non-secretor and there was no evidence that he had bled into his semen.

As Tallis explained to the Inquiry, the exculpatory nature of the semen was effectively neutralized by the trial judge's questioning of the analyst, Paynter. Although the judge commented that there was no evidence to suggest that Milgaard bled into his semen, he asked Paynter whether he could say for sure that the semen came from a non secretor. The reply was that he could not be sure due to the possibility of there being blood in the semen.

Ferris' report simply repeated what Tallis had told the jury at trial and hence was nothing new. As Ferris told the Inquiry, had he seen the addresses of counsel to the jury, he would have reworded his opinion as "simply confirming what was effectively presented in court as evidence".⁸⁵ At the most, his opinion would

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Docid 002486.
T23478.

simply have reinforced some of the defence positions at trial. Having now read the addresses, it was clear to him that the judge understood the significance of the secretor evidence.

As a re-testing of Milgaard in 1992 was to show, Ferris' report was based upon a false assumption. Milgaard was, in fact, a secretor. In a letter to the RCMP in 1993, Ferris wrote "I also spoke to Mr. Wolch, lawyer for David Milgaard, indicating to him that the methods used to determine secretor status at the time of the original investigation would not necessarily exclude David Milgaard from being a secretor and it is therefore no particular surprise for me to learn that David Milgaard is in fact a secretor".⁸⁶ He also said that in light of Milgaard's status as a secretor, his serological analysis "would not allow for the exclusion of David Milgaard as being the origin of the seminal samples".⁸⁷

The Ferris report was central to the Milgaard reopening effort, being one of the two grounds stated in the application. David and Joyce Milgaard believed, and it was repeated in the media, that the Ferris report "proved David's innocence".⁸⁸ Federal Justice officials quickly concluded otherwise.

(d) Other Witnesses and Evidence

Before filing the first application, neither Wolch nor Asper contacted or interviewed Wilson, John, Cadrain, Melnyk or Lapchuk. Although in possession of Joyce Milgaard's 1981-1983 interviews of these witnesses, they did not follow up. They had not reviewed Caldwell's prosecution file although Caldwell would have shared the entire contents with them had they asked. They made no request of Saskatoon Police to see their file. They spoke with neither Young nor Merchant nor did they look at their files. Neither of them contacted or spoke to Tallis until months after the application was filed with the federal Minister.

Amongst the materials provided to Wolch in 1986 were documents recording Joyce Milgaard and Carlyle-Gordge's efforts to locate Larry and Linda Fisher in 1983. These were either overlooked or ignored.

4. Preparation of First Application to Federal Minister

Wolch filed an application under s. 690 on December 28, 1988, requesting that the federal Minister review Milgaard's conviction. The Milgaards and Asper relied upon Wolch to choose the grounds and supporting materials. Asper told the Inquiry that he favoured the "kitchen sink"⁸⁹ approach, to include all of the information they had gathered as part of the application. He was overruled by Wolch who favoured limiting the application to Hall's affidavit and the Ferris report. In a memorandum to Asper dated December 19, 1988, Wolch told him to review a draft prepared by another lawyer in the office, and that he could add any facts deemed to be important but "none of this Nicole John crap in there".⁹⁰

The application consisted of an 11 page submission together with the affidavit of Hall, the Ferris report, the Court of Appeal decision and selected portions of the trial transcript. In it, Milgaard requested a new trial or referral of the matter to a court of appeal for further appeal. Two grounds were stated:

1. Deborah Hall's affidavit contradicted the evidence of Melnyk and Lapchuk.
2. Advances in scientific technology have allowed Milgaard to discredit the forensic evidence called at his trial and to provide evidence that exculpates him as the perpetrator of the crime.

86	Docid 041916.
87	Docid 041916.
88	T26690; T25704; T27772; T30387; T30745.
89	T25613.
90	Docid 182082.

(a) Deborah Hall Ground

With respect to the fresh evidence of Hall, the application stated that "it would appear that counsel on behalf of Milgaard was caught by surprise by the evidence of Melnyk and Lapchuk. At no time did he seek out or attempt to talk to the witness Deborah Hall."⁹¹

This was not the case. As Tallis told the Inquiry, after he became aware of the Melnyk and Lapchuk evidence on the motel re-enactment, he questioned his client. Milgaard told him that he was at the motel and that he was stoned but could not deny the evidence of Melnyk and Lapchuk. He could not recall whether he did and said what they alleged, but if he did, it was a joke. He told Tallis to contact Frank, a friend of his who was in the motel room who would help him. Tallis interviewed Frank (unbeknownst to the police and Crown) and she essentially confirmed the story of Melnyk and Lapchuk and added that she believed Milgaard's admission that he had killed Gail Miller. Based on this, Tallis did not wish to locate Hall nor did he want the Crown or police to find her as it might add further evidence against Milgaard.

When later questioned on her affidavit by a federal Justice lawyer, Hall contradicted her affidavit and confirmed the re-enactment. While she believed Milgaard was joking, she attributed even more damaging words to him than had Lapchuk and Melnyk. Based on the evidence of Hall, Melnyk, Lapchuk, Frank and Harris, it is clear that the motel room incident happened. Although the incident was perceived differently by those in attendance, there is no question that the Hall ground was without merit.

(b) Forensic Evidence Ground

The application stated that Milgaard's case was worthy of review on the basis that "advances in scientific technology have allowed the applicant to discredit the forensic evidence called at the trial and to provide evidence that exculpates him as the perpetrator of the crime".⁹² The following is an excerpt from the application:

This forms the major thrust of our application to the Minister of Justice for relief pursuant to s. 617 of the *Criminal Code*. The scientific evidence was presented at his trial but it is submitted that it was not understood. Perhaps it was too new an issue for counsel and for the judge. The trial judge simply ignores the issue in his charge to the jury and more particularly does not point out that on the evidence given at trial the evidence exonerated David Milgaard.

The analysis and submissions relating to Ferris' report were significantly flawed. Ferris essentially repeated the position Tallis had taken at trial. It was not a new issue for Tallis and he clearly understood it, having made a submission at Milgaard's preliminary hearing on the subject. He also argued the very matter before the jury. Advancing this argument without having even talked to Tallis about his understanding of the issue proved to be detrimental to the application.

Ferris' report did nothing more than re-state an argument that Tallis had made to the jury, namely that the frozen semen did not connect Milgaard to the murder.

91 DocId 000002.
92 DocId 000002.

The application also suggested that the Court of Appeal somehow missed the argument on the secretor issue. The application stated:

The Court of Appeal does talk about the blood evidence. It is unclear whether the Court of Appeal appreciated the significance of this evidence. The Court of Appeal did not point out that David Milgaard was a non-secretor. They did not point out that if there were "A" antigens found in the seminal fluid, that the seminal fluid could not have come from David Milgaard.

...

The Court of Appeal of Saskatchewan appeared to believe that the evidence was a strong factor in convicting David Milgaard. There is no discussion from the Court of Appeal as to how the evidence could exonerate him.⁹³

In fact, the semen evidence and the secretor issue were not raised as grounds of appeal and the Court did not mention evidence relating to semen as being a strong factor in convicting David Milgaard. Rather, the Court of Appeal discussed the secretor evidence in the context of the relevance of Wilson's blood type (which was a ground of appeal) and held that it was relevant in light of the admission of the secretor evidence. Therefore, while the Court did place some importance on the secretor evidence, it did so only because its admission at trial made Wilson's blood type relevant.

(c) Conclusion

After eight years of gathering information, the two grounds put forward in the first application to the Minister were matters that could have been explained had Tallis been consulted. He would have told Milgaard counsel that Hall would not have helped the case at trial. He would have also explained that all of the secretor arguments raised by Ferris were raised by him at trial and effectively neutralized by the judge's questioning of Paynter when he said he could not conclusively say whether the frozen semen came from a secretor or not. But he had still argued before the jury that the frozen semen exculpated Milgaard because there was no evidence of Milgaard's blood in the semen.

The application made no use of Joyce Milgaard's 1981 interviews of John and Wilson, particularly relating to the effect of questioning by Roberts on the reliability of their trial evidence. Nor was Fisher mentioned.

Until this Public Inquiry, both David and Joyce Milgaard continued to believe that the Ferris report proved David's innocence. Unfortunately, the two grounds advanced in support of the application were flawed. The application omitted reference to all other information gathered by the Milgaard group in the preceding eight years.

Already frustrated by the time it took to file the application, the Milgaards became even more frustrated with the federal Justice review which, to them, ignored the strength of the two grounds advanced.

Better grounds for supporting an application under s. 690, as it then was, existed prior to the end of 1988, but it is mostly with the benefit of hindsight that one can say that these grounds should have been identified and used. The difficult task faced by Milgaard and his supporters was simply beyond their means and abilities.

Part VIII – Federal Justice Review of First Application

1. Role of Federal Justice Lawyers

The Milgaard application was assigned to federal Justice lawyer Eugene Williams, whose task was to review the application, investigate the grounds raised and provide a report and advice to the federal Minister. He was performing the investigation and review in his capacity as the federal Minister's legal counsel, and did not consider that he owed any duty to Milgaard or his counsel nor did he have any obligation to disclose the fruits of his investigation to Milgaard. Since the federal Minister made the ultimate decision, Williams said it would be inappropriate for him to form views or to share his views on the merits of the application with the Milgaards. Even if Williams concluded that a ground was without merit, he did not view it as his place to inform the applicant since it was ultimately the Minister who made the decision. Williams was not in a position to comment publicly on the work he was doing or the application generally.

Williams testified that his initial task was to review the application to ensure that it raised appropriate grounds and that it was not simply re-arguing the case. According to Williams, the applicant had to identify new information not considered by previous courts that would tend to show a likelihood of a miscarriage of justice. The Milgaard application met this criteria and passed the initial screening.

Williams' next task was to investigate the grounds raised by the applicant and the supporting evidence to be able to prepare a report to the Minister. Williams did not view it as his role or responsibility to seek out or identify other grounds that might support the basis of a miscarriage of justice. He viewed that as the applicant's responsibility. He knew Milgaard had senior counsel, and that Wolch had been preparing the application for at least three years. Williams did not view it as his responsibility to interview a witness unless it was relevant to an issue raised by the applicant.

While Milgaard was represented by senior counsel, Wolch and Asper were effectively working on a pro bono basis. Legal aid for Milgaard's conviction review application was not available despite requests made to both Saskatchewan and Manitoba.

The Milgaard application did not raise any issue with respect to the evidence of Wilson, Cadrain and John (although the cover letter to the Minister made reference to the "impossibility" of John's statement). If their evidence was relevant to Milgaard's assertion of a miscarriage of justice, Williams expected that Wolch would have included such a ground in the application. Williams told the Inquiry that he informed Milgaard's counsel of his role on a number of occasions.

Milgaard's counsel had a different perspective on Williams' role. Asper told the Inquiry that after the application was filed, he believed the federal Justice lawyers would review the entire case and seek to identify any grounds supporting a miscarriage of justice, not being limited to those raised in the applicant's materials. He expected that Williams would interview all of the key witnesses, regardless of whether any issue was directly raised in the application. In that respect, Asper thought that they would work "collaboratively"⁹⁴ in the sense of trying to detect whether a miscarriage of justice occurred.

The differing views on Williams' role in reviewing the application was a factor that led to frustration on the part of both Milgaard counsel and Williams, and led to a deterioration of their relationship which became adversarial and acrimonious. Milgaard counsel apparently did not understand Williams' role and became very critical of his work, particularly when he identified problems with the materials filed and positions taken.

They expected Williams to be more responsive and to tell them what he was doing, when and why he was doing it and to share the results of his work. However, Williams was the Minister's counsel and was not able to share the fruits of his work with Wolch and Asper. On occasion, when Williams did provide information, it was leaked to the media and reported in an incorrect and unfavourable light. This caused Williams to become more careful in what was disclosed to Milgaard counsel, resulting in further frustration and criticism on their part.

2. Media Campaign

The Terms of Reference required the Commission to seek to determine whether the investigation should have been reopened based upon information received by Saskatchewan Justice and police. The Milgaards chose to use the media as a means to communicate information to the authorities, often before they gave the information directly to the authorities. As Asper told the Inquiry, the media campaign was a deliberate strategy designed to seek public support for David's case. Milgaard had been in jail for many years and no one seemed to be listening to his pleas. He and his mother felt that if they could get some public exposure, authorities and others might start to pay attention.

Asper and Joyce Milgaard told the Inquiry that since the decision maker in the s. 690 proceeding was a politician, the process necessarily was political and public and they felt it necessary and important to publicly influence the Minister. They also had doubts that the s. 690 process would provide a favourable result and concluded that obtaining public support through the media would assist Milgaard in his "war of liberation"⁹⁵. Asper commented that once the media was engaged, they were difficult to control.

The manner in which information was communicated through the media and its credibility were factors which influenced the authorities in their decision making. As part of its mandate, the Commission examined what was reported in the media, its source, its credibility and the effect such media information had on the authorities.

The media played a significant role in the s. 690 proceedings. Even before the federal Minister received the first application, the Milgaards and their counsel had sought out the media for public exposure of the case. At the same time as the first application was sent to the federal Minister on December 28, 1988, a copy was sent by Asper to the CBC Fifth Estate, offering them an exclusive 7-10 day time limit for them to commit to air a story, failing which the story would be offered to the media in general.

In August 1989, Dan Lett of the Winnipeg Free Press wrote his first story about the Milgaard case. In the months and years that followed he and other reporters wrote a number of stories about Milgaard's application to the federal Minister. The media stories relied primarily on the Milgaards and their counsel as sources and were often incorrect and misleading. Federal Justice lawyers were not in a position to comment on the stories while the application was being considered and as a result a rather one sided story emerged in the media.

Realizing that they were not likely to receive a favourable response to their application, the Milgaards argued their case through the media, rather than waiting for the s. 690 application to run its course. Although their efforts brought national attention and political and public support, they were ultimately detrimental to the first s. 690 application and the reopening effort.

The media campaign was counter-productive in convincing the authorities (federal Justice lawyers, the federal Minister, Saskatchewan Justice and the police) that Milgaard's position had merit. Much of the information put forward by the Milgaards, and reported in the media, was inflammatory, inaccurate and misleading. The media campaign had public appeal, but it did not impress those in authority who knew the underlying facts.

The grounds advanced to support Milgaard's claim of innocence were often wrong and known to be so by the authorities. Because the Minister and her officials could not respond publicly, the public did not get the full story. As Asper conceded at the Inquiry, if Williams had been able to respond publicly on the first application, he could have "shut down" the media campaign early in the process.⁹⁶

In addition to adversely affecting the s. 690 application, the media campaign weakened the confidence in the administration of justice, and hurt the reputation of many individuals involved in the investigation, trial and review of Milgaard's conviction.

Public knowledge of the conduct of the police, Crown, defence counsel, witnesses, federal Justice lawyers and the Minister, and the administration of justice, has been based primarily on what has been reported in the media, sometimes inaccurately. It is important for the sake of the better administration of criminal justice in this province to set the record straight.

All parties before the Commission agreed that the media is not the proper forum for the review of wrongful convictions, but the Milgaards asserted that a media campaign was necessary because of systemic flaws in the conviction review process. Notwithstanding the important role the media plays in the criminal justice system generally and in exposing potential wrongful convictions, the media coverage of the Milgaard case demonstrates the need for a more dispassionate forum.

In spite of its faults, the media campaign ultimately resulted in Milgaard obtaining a remedy and being released from prison in 1992. After the first application was rejected, the federal Minister bowed to public pressure on the second application and referred the matter to the Supreme Court of Canada for a Reference Case, which resulted in Milgaard's conviction being set aside and his release from prison.

3. Delay in Reviewing the Application

The Milgaards were, and remain to this day, very critical of the time it took for Justice Canada lawyers to deal with the first application. While their impatience was understandable, their criticism is unjustified. David Milgaard had been in jail for 19 years before his first application was even filed. Eight years had passed since his mother began gathering information for an application. Confident that he had meritorious grounds, he expected a favourable and expeditious reception of his application. Thinking that the Ferris report proved his innocence, David Milgaard and his mother became frustrated by a lack of response from Justice Canada. In fact, the report was quickly discounted by Justice Canada, and properly so.

It is not clear that David was ever told about the problems with the Ferris report. Both he and his mother told the Inquiry that they still believed that it proved his innocence. David Milgaard did not have direct

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contact with Williams and was informed, if at all, of what was happening by his mother and his counsel. Conscious of his fragile emotional state, they were reluctant to share bad news.

Upon receipt of the application, time was needed for review and evaluation of the grounds by Justice Canada lawyers who were further delayed by actions of the Milgaards. Firstly, the application when filed was not complete. The trial transcripts and key lab reports were not included and were provided only five months later. Williams began his review, therefore, only in May 1989.

The Milgaards told the Minister that in addition to counsel's written application, David and Joyce would be filing a "family presentation"⁹⁷ and video that would supplement the formal application. Williams had no choice but to wait a reasonable time for the additional information, lest he be criticized for proceeding with a partial application. David Milgaard wrote directly to the federal Minister on a number of occasions referencing the family presentation and his counsel confirmed with Williams that it would be forthcoming. It was never provided. At the Inquiry, Asper and Joyce Milgaard said that the family presentation was a project to keep David busy and that it was not intended to be a significant part of the application. Williams was never informed of this.

The application review was also delayed as a result of new grounds being advanced after the application was filed. After filing, information was submitted about John, and more than a year later about Fisher, and 18 months after that, about Cadrain and Wilson and the dog urine theory. Each of these had to be reviewed when received.

The media campaign also delayed the progress of the application. Every time a significant media report regarding the application was published, Williams had to divert his attention to preparing briefing notes for the Minister's office. He devoted significant time providing internal responses to news stories, when the time could have been spent on reviewing the application.

4. Initial Screening of the Application

The Minister's initial response to the application was by letter dated February 16, 1989, requesting transcripts and lab reports to complete the application. In Wolch's covering letter with the application, he stated that "he was in a position to factually demonstrate the errors in Nichol John's statement and that "it cannot possibly be true".⁹⁸ The federal Minister responded that "any information and material which you have in relation to that would be of assistance in assessing the merits of the application".⁹⁹ Milgaard was also asked to provide a waiver of his solicitor/client privilege with Tallis.

On May 8, 1989, the application was completed and the trial transcripts and RCMP lab reports were provided by Wolch to the Minister. Williams concluded that the application passed the initial screening threshold – namely that it raised new grounds that if proven could establish a reasonable likelihood of a miscarriage of justice. Williams then proceeded to review and verify the evidence filed in support of the application.

5. Review of Dr. Ferris Report

The CBC had expressed interest in airing a documentary on the Milgaard case and was looking for evidence to support the claim of innocence. The Milgaards believed that the Ferris report provided

97	Docid 333331.
98	Docid 000002.
99	Docid 004868.

sufficient proof, but even before Williams started his review of the report, the Milgaards received information from CBC Fifth Estate bearing on the claim that the report proved Milgaard's innocence. A copy of the report had been sent to the Fifth Estate when the application was filed with the Minister.

By March 8, 1989, the CBC had retained an expert to review the report and had determined that it did not support Milgaard's claim of innocence. In a letter dated March 8, 1989, to Asper, the executive producer for the Fifth Estate stated:

This is to let you know that the fifth estate is unable to do a story on the case of David Milgaard. I say this with great regret, because I know how much importance Mr. Milgaard was placing on the fifth estate to publicise his claim of innocence. Unfortunately, after spending considerable effort and expense on the matter, we have concluded that we cannot get enough evidence to produce a documentary that would support Mr. Milgaard's claim. This does not mean that we believe Mr. Milgaard to be guilty; it is only that we cannot prove his innocence. And proof, fairly conclusive proof, is what we have always needed before we could commit ourselves to putting the Milgaard case on the fifth estate.

...

Then producer Gordon Stewart and researcher Sandra Bartlett asked us to look at the criticisms of Dr. James Ferris about the handling of the forensic evidence at the trial. We examined this as best we could, did further research, and then concluded there are other experts around who can challenge much of what Dr. Ferris has to say.¹⁰⁰

Wolch was told by the Fifth Estate that they contacted someone in Toronto who disputed the Ferris findings. Asper sent a memo to Wolch on March 13, 1989, advising that they should think of plan "B" and go public with someone else. None of the foregoing was shared with the federal Minister.

One of the first news stories to appear in print was written by Dan Lett and ran in the Winnipeg Free Press on August 5, 1989. At the time of the article, the Ferris report was being reviewed by an RCMP expert.

In his front page story, Lett writes, "Milgaard and Winnipeg lawyer David Asper have spent the past two years trying to persuade the federal government to reopen his case."¹⁰¹ This was incorrect as federal Justice had only commenced its review of an application that it had received months earlier. Although three years had passed since the matter had been placed with Wolch's office, Justice Canada was not asked to reopen the case until the application was filed on December 30, 1988. Lett went on to describe the process as "extraordinary but plodding".¹⁰²

In the same article, Lett discusses the Ferris report: "According to Ferris' report, in which he re-examined extensively the trial transcripts and physical evidence, the semen sample was incorrectly analyzed by RCMP pathologists and in fact proves Milgaard's innocence".¹⁰³ Ferris told the Inquiry that his report did not say that. Nor did he say that the semen sample was incorrectly analyzed by RCMP pathologists. The sample was reviewed by RCMP lab personnel who correctly analyzed the semen sample.

On August 8, 1989, Williams received a report from Patricia Alain, the Chief of Serology with the RCMP lab at the time. Williams had asked her to review Ferris' report and conclusions. Alain's report essentially

100	Docid 218743.
101	Docid 025909.
102	Docid 025909.
103	Docid 025909.

confirmed that the Ferris report was of no value in Milgaard's application due to faulty assumptions and flawed analysis.

Alain said that Paynter's test suggesting the presence of A antigens in the frozen semen was not conclusive proof that the donor of the semen was an A secretor.

The A antigen could have originated from contamination due to external environmental sources and not from the semen. Contamination of the semen by bacterial soil or environmental sources (as Ferris suggested), could trigger a positive A antigen result. Another possibility was that whole blood could have been in the semen.

Finally, and perhaps most importantly, the assumption that Milgaard was a non-secretor, based upon the test conducted in 1969, was questionable. That A antigens were not found in the saliva sample in 1969 was not conclusive of non-secretor status. Alain gave a number of explanations as to how Milgaard could be a secretor yet his saliva test might not disclose A antigens.

On the basis of this review, Williams properly concluded that A antigens in the frozen semen did not conclusively establish that the donor was an A secretor. Even as a non-secretor, Milgaard's innocence was not proven.

Williams also considered the possibility of DNA analysis on exhibits tendered at Milgaard's trial and made inquiries with Barry Gaudette, Chief Scientist-Molecular Genetics, of the RCMP Central Forensic Laboratory in September 1989. Gaudette advised Williams that he was of the view that current DNA technology would not enable him to test the material, but that technology would likely be developed within two years that could test the existing material for the presence of DNA. Gaudette reviewed the information that had been sent to Alain (the Ferris report, transcripts and Paynter's lab reports) but did not physically examine any items of clothing at this time.

Williams subsequently learned that the position put forward in Ferris' opinion was precisely the same defence raised by Tallis at trial before the jury. There, Tallis argued that Milgaard as a non-secretor was precluded from being the donor of the semen. However, the evidence from Paynter was that his testing of the frozen semen could not conclusively determine whether it came from an A secretor or not. Although Ferris had warned that Milgaard's secretor status should be tested it was not done until February 1992, when Saskatchewan Justice demanded it be done if Ferris' report was going to be used at the Reference Case. Milgaard was determined to be an A secretor, meaning that he could have been the donor of the semen.

As Williams reported to the Minister's office after receiving Alain's report: "The forensic analysis performed to date reveals that there are grave omissions in the submission of the applicant which undermine the conclusions he has reached".¹⁰⁴ The Ferris report merely re-stated positions taken by Milgaard's trial counsel 18 years earlier and did nothing to support the application.

While Williams had concluded by August of 1989 that the Ferris ground was of little or no value, both David and Joyce Milgaard continued to believe that the Ferris report established innocence. Williams agreed that with hindsight, it might have helped for the Milgaards to have been informed that the Ferris report did not prove David's innocence. However, he stated that the decision was the Minister's to make

and could be taken only once the investigation had been completed. Furthermore, Milgaard had legal counsel and it was their obligation to inform the Milgaards about the strength of the Ferris report.

There was no formal communication from federal Justice to legal counsel for the Milgaards regarding the Ferris report prior to the October 1, 1990, meeting, but Williams testified that he believed that they were well aware of departmental concerns. They knew that opinions on the Ferris report had been obtained by federal Justice, and that Williams was nearing the conclusion of his investigation. Williams stated: "If the Ferris report was the key to unlock David Milgaard's cell, that key would have been used in August 1989".¹⁰⁵ In other words, if the Ferris ground had supported a likely miscarriage of justice, a remedy would have been granted without the need to further investigate other grounds advanced. Finally, to the extent that there were problems with the Ferris report, it was the responsibility of Milgaard's legal counsel to determine those problems and assess the credibility of the opinion. Williams' obligation was to evaluate the Ferris report for the benefit of his client, the federal Minister.

6. Review of Deborah Hall Affidavit

On August 29, 1989, Asper wrote a letter directly to the federal Minister stating:

Finally Mr. Asper and Mr. Williams were recently discussing the statement provided to the police by Ms. Ute Frank. This is a statement given by a witness who was never called at the trial but which refutes evidence given at trial to the effect that Milgaard re-enacted the killing some months after in the motel room in Regina. One would think that this statement combined with the Affidavit of Deborah Hall that was filed with our original application would tend to seriously draw into question the veracity of the evidence that was given at trial. Aside from that issue, however, we were unaware of the existence of the statement of Ms. Frank and would appreciate your forwarding it along with any other information that you may have in respect of this case at your earliest convenience.¹⁰⁶

Frank provided the police with a statement in January 1970. She was in the motel room with Melnyk, Lapchuk and Hall at the time Milgaard re-enacted the murder. When first interviewed by the police, she gave them an incomplete account of the incident. When Tallis raised the motel room incident with Milgaard, he told Tallis that Frank was a friend of his and would help him. Tallis contacted Frank during the trial and interviewed her. She not only confirmed Melnyk and Lapchuk's story about what happened but went further and said that she believed Milgaard when he re-enacted the murder and admitted killing Gail Miller and would say so if she testified. She said she gave the police an incoherent statement so that she would not be called to testify. Tallis obviously did not want Frank called as a witness nor did he want to locate Hall who would have given similar evidence, although 20 years later Hall said she thought Milgaard was joking.

In 1981, Joyce Milgaard had obtained a copy of Frank's January 20, 1970, statement from Tallis' file. The statement was provided to Wolch and Asper in early 1986.

Asper's letter was sent from the Minister's office to Williams. Williams then sent Asper a copy of Frank's statement by letter dated October 2, 1989, remarking "Had you the benefit of reading it before you wrote the Minister on August 29, 1989, you may have avoided improperly characterizing its contents".¹⁰⁷

105	T34397.
106	Docid 010056.
107	Docid 157019.

On October 22, 1989, Lett published a story in the Winnipeg Free Press regarding the Frank statement. In the lead paragraph, Lett writes:

A police statement from a witness who directly refuted damning testimony given at the 1969 murder trial of David Milgaard has been released by the Federal Justice Department 20 years after he was convicted...

The statement, released last week, contradicts testimony from two men who say they saw Milgaard re-enact the murder in a Regina hotel room.¹⁰⁸

Lett then went on to describe Hall's affidavit saying that she swore that Milgaard did not re-enact the murder but even though the police knew that she was in the room she was never interviewed. Lett further reported:

Asper said either of the statements from the two women, if used at the trial, could have successfully refuted Lapchuk's and Melnyk's testimony, which was considered very powerful and persuasive.

Asper said he's puzzled why the police would take the statement and is unsure about whether Milgaard's counsel even knew the statement existed.¹⁰⁹

The news article was not well received by Williams and the federal Justice Department. As Williams told the Commission, he provided the Frank statement to Asper thinking that Asper needed the statement for matters related to the s. 690 application. He did not expect that the statement and Frank's name would be publicized in the media.

He also took issue with a number of factual errors in the article. Lett wrote that Frank's statement had been released to Milgaard the prior week, 20 years after he was convicted. Frank's statement was provided to Milgaard's trial counsel the day it was taken by the police in 1970. The article wrongly suggests that federal Justice was withholding the statement and that Frank's evidence, if used at trial, would have contradicted Melnyk and Lapchuk's evidence. In fact, if Frank had been called as a witness, she would have corroborated their evidence. Asper's speculation that Tallis may not have known that the statement existed was unfounded. Joyce Milgaard provided Asper with a copy of the statement in 1986 which she had received from Tallis' file.

Shortly after Lett's article, Williams questioned Hall under oath before a court reporter. Williams did not think her affidavit was complete and wanted to probe her recollection of events. In her affidavit, Hall had stated that Milgaard simply fluffed the pillow and said words to the effect of "oh yeah right",¹¹⁰ when confronted with the allegation by Melnyk and Lapchuk that he had killed the nurse. But questioned by Williams, she confirmed that not only had Milgaard re-enacted the murder with a pillow by hitting it with his hand, he also uttered that he was "fucking her brains, oh, yeah, right. I stabbed her I don't know how many times and then I fucked her brains out. Right".¹¹¹

This evidence was noticeably absent from Hall's affidavit. Hall told the Inquiry that she was not sure why she did not tell Asper about Milgaard's comments.

108 Docid 220222.

109 Docid 220222.

110 Docid 026356.

111 Docid 001285.

While essentially confirming the evidence of Melnyk and Lapchuk that Milgaard stabbed a pillow and uttered words to the effect that he had stabbed and killed Gail Miller, Hall told Williams that she viewed the words as being crude and sarcastic, and that Milgaard was just being silly and stoned. She did not believe him when he said it and thought that he was joking.

Because of what Frank had told him about the motel room incident and given Milgaard's inability to deny the incident, Tallis concluded that Hall's evidence would be unfavourable if heard by the jury and he did not seek her out. In light of what Hall told Williams in November of 1989, Tallis said he certainly would not have called her as a witness as her evidence would have been devastating to Milgaard's case, even though she viewed his comment as being a crude joke.

Because of Asper's use of the Frank statement and the publication of the Lett article, Williams changed his approach with Asper and Wolch. He testified that he became much more guarded in his communications with them and more concerned with the timing of disclosure. As a result, he did not send them a copy of either the transcript of Hall's evidence or Alain's assessment of Ferris' expert report until the meeting on October 1, 1990. Based on his experience with the Frank statement, Williams decided he would "hold off sharing until such time as we'd come closer to completion of all of our materials and then give counsel an opportunity to comment on what had been gathered."¹¹² Williams acknowledged that he provided counsel with less information than he otherwise would have, had the Frank statement not found its way into the newspaper.

Williams did not disclose his findings on Hall and Ferris publicly. He explained to the Inquiry that he did not want to have the application argued in the media and that his role was to gather information and advise the Minister so that the Minister could make her own decision. He was also constrained in the release of information by *Privacy Act* considerations. On his reasons for not commenting publicly he stated:

Given that the decision is made by the Minister of Justice upon the completion of all of the work, it is inappropriate, it would be premature for a departmental official to presume to replace the Minister and make some kind of pronouncement on any aspect of the application, it's simply not our function, because that function is reserved by parliament to the Minister of Justice.¹¹³

He remarked, however, that his inability and that of the Minister's to respond to the erroneous media reports left the wrong impression with the public about the merits of Milgaard's application. This resulted in pressure on the Minister from the public who could not understand why she had not already granted a remedy.

7. Nichol John Interview

Although the formal application did not raise John's evidence or her May 24, 1969 statement as a specific ground, the covering letter to the application commented on her statement. In reply, the Minister asked Wolch to provide any information that he wished to have the Minister review. In his May 8, 1989, response, Wolch stated, "It is our position that the contents of this statement are false because it is inconsistent with the physical facts of the case and cannot therefore reasonably be true".¹¹⁴

112	T32422.
113	T32674.
114	Docid 032905.

Because John did not adopt the most incriminating parts of her May 24, 1969, statement in her evidence at trial, those parts of the statement were not evidence before the jury for truth of contents, but Williams told the Inquiry that he felt it appropriate to interview John to find out her recollection of events. Concerns regarding her statement had been raised by Wolch. Further, he thought that she was an important witness at trial and that her statement was part of the circumstantial fabric of the case against Milgaard.

On November 8, 1989, he, together with an RCMP officer, interviewed John in Kelowna. The interview was recorded and a transcript provided to the Commission. Williams provided her with a copy of her May 24, 1969, statement. She had little recollection of its contents but said that she told the truth to police in giving the statement.

John had a poor recollection of the events of January 31, 1969. She remembered encountering a girl and asking for directions. She remembered Milgaard throwing a cosmetic case out the window after they left Saskatoon, and a church and garbage cans and Milgaard and Wilson getting out of the car and going different directions. After Wilson and Milgaard left the car, she said her mind was blank as to what happened next.

She next recalled when it was light and they were at Cadrairs. She said, "I've got nothing between there, do you know what I mean? No, no, no recollection. No, like, its dead space".¹¹⁵ She said, "There's been so many times that I've thought, okay, maybe he isn't guilty, maybe what I said I picked out of the air but, ...I don't know if you can understand, but there's time missing in my life, I don't know where it went to".¹¹⁶

John had no recollection of witnessing Milgaard grab a girl, drag her down the alley and stab her as recorded in her earlier statement.

Williams questioned her about her dealings with the police, but she had no recall of her May 23, 1969, interview with Roberts or of her statement to Mackie the next day. Williams asked whether there was any pressure brought to bear on her to tailor her recollections one way or another. She remembered the police saying "take your time, we don't wanna, we don't wanna to put words in your mouth"¹¹⁷ and she said there was no pressure.

John told Williams that for the last number of years she had experienced flashbacks where she could see a man straddling a woman and stabbing her, taking the purse and putting it in the garbage can. She said "I don't know if those things are, if I really saw them or I, from hearing people..... I can't tell you for sure that that's what I really saw."¹¹⁸ In the course of her interview John apparently had a flashback. She said she could see a woman on the ground and a guy straddled over her. She could not see his face and never could but could hear the woman screaming. John said that the flashback she has of a man stabbing a woman is always the same.

Her reaction had a significant effect on Williams. He told the Inquiry that it certainly appeared as if John had witnessed the murder of Gail Miller.

John was asked to describe the scene where her flashback takes place. She drew a map of where in the alley she was, where the garbage cans were, where the church was, where their vehicle was and where

115 Docid 125206.

116 Docid 125206.

117 Docid 125206.

118 Docid 125206.

she believed the man was straddling the girl. The drawing accords very closely to the Miller crime scene, and Williams was impressed by her ability to make it 20 years after the incident. He said this "signalled a fairly traumatic event that had etched, had been burned into her memory".¹¹⁹ What Williams did not know and did not learn until the Inquiry, is that in 1981 Joyce Milgaard showed John a map of the area where Gail Miller's body was found highlighting the church, garbage cans and how John might have witnessed someone other than David killing Miller. Although there was no evidence to suggest that Joyce Milgaard's interview map might have influenced John's recollection of the alley, Williams said that had he been aware of the map being shown to John in 1981. It might have affected his view of the significance of John's evidence.

8. December 1989 Report

By December 1989, Williams had completed his investigation of the grounds cited in the December 1988 application (Hall and Ferris), and his report to the Minister was making its way through the Justice Canada hierarchy before being presented to the Minister for decision. Williams had concluded that the grounds presented in the application were without merit and did not provide the basis for a remedy under s. 690. But before the federal Minister was presented with the report, new grounds were advanced by the Milgaards.

In late February 1990, the Milgaards claimed that Fisher might have been responsible for Miller's murder. This assertion was initially based upon a phone call Wolch received from an anonymous informant. Williams engaged Sergeant Rick Pearson of the RCMP to investigate Fisher as a possible suspect.

In May 1990, Henderson, a private investigator engaged by the Milgaards, obtained a statement from Albert Cadrain wherein he claimed that he was put through "hell and mental torture"¹²⁰ by the police. In June 1990, Henderson obtained a statement from Wilson recanting his incriminating trial evidence. These statements were initially published in the media and then provided to the federal Minister as supplemental grounds to the application.

In June 1990, the Milgaards provided Williams with a report from forensic pathologist, Dr. Peter Markesteyn, suggesting that the frozen semen which, according to the earlier report proved Milgaard's innocence, was in fact dog urine. The Markesteyn opinion undermined the Ferris report but was of great interest to the media.

Part IX – Supplemental Grounds to First Application

1. Larry Fisher

(a) Sidney Wilson – The Anonymous Call

On February 26, 1990, an anonymous male caller telephoned Wolch in Winnipeg telling him that Larry Fisher of North Battleford was Miller's killer. He claimed that Fisher's wife told him that Fisher arrived home on the morning of January 31, 1969, "covered with blood"¹²¹ and that when she heard of the murder later

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T32812.

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Docid 000229.

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Docid 333341.

that day she concluded that Fisher may have had some involvement. The caller told Wolch that he had gone to the police a number of years ago with the information, and that Fisher was currently in jail for a rape or murder or both.

The caller would not provide his name or contact number or anything else to identify himself. In subsequent correspondence with federal justice Wolch said that the caller identified himself as "Sidney Wilson".¹²²

Wolch gave the information to Joyce Milgaard, who remembered Fisher from her 1983 investigative efforts. She recalled that his wife's name was Linda and that they lived in the basement of the Cadrain house and had a daughter named Tammy. She also recalled reading Fisher's name in a police report that Carlyle-Gordge had obtained from Caldwell's file in 1983, indicating that Fisher had been questioned by Saskatoon Police three days after the murder.

At the time, neither the Milgaards nor Williams were able to identify or locate the anonymous caller. In 1993, the RCMP seized Wolch's phone records and were able to trace the February 26, 1990, call to Bruce Lafreniere, an acquaintance of Linda Fisher's. Lafreniere confirmed he had called Wolch with the information on Fisher but did not leave his name because he was afraid of Fisher whom he knew from years earlier. Lafreniere denied using the name Sidney Wilson in his call to Wolch.

(b) Larry Fisher Added to s. 690 Application

On February 28, 1990, Asper contacted Williams about the anonymous caller and gave him Joyce Milgaard's additional information regarding the Fishers. In a follow up letter of the same date, Asper confirmed the information provided by telephone saying that the Fisher information could be very important in the development of the Milgaard application, and "one which we respectfully believe ought to be fully investigated".¹²³

Asper asked for Williams to either make funds available to them to investigate Fisher or undertake the investigation himself. Williams replied with a letter the same day indicating that "the issues raised will be carefully investigated and considered. You will be advised of the outcome of this application in due course".¹²⁴

The Milgaards initially asked Williams to investigate Fisher as a suspect but soon thereafter alleged that Fisher was Miller's killer. Milgaard's counsel never formally amended their s. 690 application to articulate the basis upon which the Fisher information supported it. Instead, they sent a number of letters to Williams in the months following indicating that:

- Fisher was the "true killer"¹²⁵ and therefore Milgaard was innocent;
- even if it could not be proven that Fisher was the perpetrator, the suspicion about him was enough to support an s. 690 remedy.

With the assistance of the RCMP, Williams investigated the Fisher information to determine whether it provided the basis for a remedy under s. 690. Williams instructed the RCMP to look for credible evidence tending to prove that Fisher killed Miller. Such evidence tended to show Milgaard's innocence and would

122	Docid 333341.
123	Docid 333341.
124	Docid 157049.
125	Docid 010045.

provide the basis for a remedy under s. 690. Suspicion and accusation would not suffice. As Williams told the Inquiry, identifying another suspect 21 years later, was not in itself a basis for a remedy under s. 690.

(c) Initial Steps of Eugene Williams

On February 28, 1990, Williams contacted the Saskatoon RCMP and arranged for a senior officer, Pearson, to assist him with the investigation of Fisher as a suspect. Because it was alleged that another person was responsible for Miller's murder, Williams thought that police should be involved in the investigation and he used the RCMP rather than the Saskatoon Police to avoid any suggestion of a conflict of interest.

Williams asked Pearson to look for evidence showing that Fisher was the perpetrator of Miller's murder. He asked him to follow up on the information provided to Wolch by "Sidney Wilson", to find Linda Fisher and confirm the conclusions attributed to her by Sidney Wilson.

Williams contacted Caldwell on February 28, 1990, to see if he knew anything about Linda or Larry Fisher and to have him review the prosecution file for any reference to them. Caldwell had heard of neither Fisher nor Sidney Wilson.

Williams also asked Saskatoon Police if they had interviewed Larry or Linda Fisher during the Miller investigation or anytime thereafter and whether Sidney Wilson had contacted them about Fisher being Gail Miller's killer.

The Saskatoon Police reviewed the entire Miller investigation file and found no record of any interview of Linda Fisher during the original investigation. But they gave Linda Fisher's August 28, 1980, statement to Williams.

Their file did not indicate that Sidney Wilson or anyone else had contacted the police during the original investigation, about Fisher being responsible for the murder. The only reference to Fisher was the February 3, 1969, interview at the bus stop where Fisher was checked while on his way to work.

Williams obtained Fisher's criminal record on February 28, 1990, which identified the venue where the convictions were entered, but not where the offences were committed. The four sexual assaults committed by Fisher in Saskatoon (1968 to 1970) were shown as Regina convictions entered on December 21, 1971. The dates of the offences were not identified. The Winnipeg and Fisher Victim 7 convictions were noted.

Asper also obtained Fisher's record from a police source and sent it to Williams on March 15, 1990, saying:

This would appear to indicate that Mr. Fisher had committed at least three rapes prior to the murder of Gail Miller in Saskatoon. Furthermore, it is our understanding that some of the offences occurring prior to the murder of Gail Miller occurred both in Regina and Winnipeg.¹²⁶

It was not until July 1990 that Williams and Pearson learned that Fisher's 1971 Regina convictions related to offences committed in Saskatoon.

(d) Milgaard Parallel Investigation

The RCMP commenced their investigation of Fisher on the same day that Milgaard's counsel shared the information with Williams. Despite receiving assurances that the RCMP would immediately investigate Fisher, Joyce embarked on her own investigation of him, trying to interview witnesses before they were contacted by the RCMP.

She insisted on being personally involved in the interviews. As she told the Inquiry, she did not trust anyone but herself or someone on her team to investigate Fisher. She mistrusted the federal justice department and the RCMP, believing that Williams and the RCMP were involved in a cover-up of information which should have led them to the truth. Nor did she want to share her information with authorities fearing that they would change it.

She sought advice from James McCloskey of Centurion Ministries, an American association which assists claims of the wrongfully convicted, about what she should do with the Fisher information. He told her not to give it to federal Justice because the Justice Department didn't want to let David out and would "drag their feet on this".¹²⁷

Joyce Milgaard testified that she could not wait for the RCMP and therefore proceeded on her own. She believed that as a "mom" she could get Fisher to confess more readily than could trained RCMP investigators and could obtain better information from witnesses than either police or the authorities. She seemed oblivious to the risk that her involvement with witnesses might hamper the police investigation. Her questioning techniques often included suggesting her version of events to the witnesses and then taking incomplete and misleading statements from them.

She sought media exposure from the start, disclosing the Fisher information to a number of outlets, asking reporters to investigate him. She claimed to have obtained their agreement not to publish Fisher's name without her approval, and told the Inquiry that she trusted the reporters more than she did Williams, Pearson and the RCMP.

Joyce Milgaard's involvement in the investigation and her disclosure of Fisher information to the media concerned Asper because her efforts could undermine Pearson's investigation. He advised her not to investigate Fisher and not to make any public pronouncements, particularly about information Asper got from the RCMP. She ignored this advice.

Joyce Milgaard told the Inquiry that if she had had her way, she would have publicized Fisher's name immediately. Instead, she delayed to allow the RCMP some opportunity to investigate. But on May 10, 1990, in the midst of the RCMP investigation, John Harvard, a member of Parliament and a Milgaard confidante, publicly disclosed details of the RCMP investigation in his questioning of the federal Minister. Although not mentioning Fisher's name, he said that the RCMP were investigating a suspect who was incarcerated in the Prince Albert Penitentiary. Approximately one month later, Fisher was identified by a number of media outlets as the suspected killer of Gail Miller, much to the detriment of the RCMP investigation.

Joyce Milgaard's parallel investigation did not uncover any facts which were not obtained by the RCMP. More than once, she interfered with and compromised their investigation, despite repeated requests to avoid doing so. She leaked information to the media about Fisher and the RCMP investigation, so that

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T30542; and Docid 336804.

Fisher became aware that he was a suspect in Miller's death before the RCMP had an opportunity to approach him. This limited the investigative techniques available to them. Fisher was publicly identified as Miller's killer weeks in advance of his scheduled polygraph and deposition. The media campaign hindered the official investigation of Fisher and produced no information linking him to the murder.

(e) RCMP Investigation

Rick Pearson was an experienced RCMP officer in charge of the General Investigation section in Saskatoon. He began his career with the RCMP in 1965 and had investigated hundreds of major crimes. Despite his many years with the force, Pearson had never heard of Miller's murder, Milgaard's conviction or Larry Fisher. He brought a fresh perspective to the case and as he told the Inquiry his job was simply to investigate and find the truth.

Pearson's mandate was narrower than the usual murder investigation. Although he was investigating Fisher as a suspect in Miller's murder, Pearson was not conducting a formal investigation into the death of Gail Miller. He took his instructions from Williams and his task was limited to investigating whether there was evidence to link Fisher to Miller's murder for the purpose of Milgaard's s. 690 application. Pearson testified that if he had found evidence to support a charge against Fisher, he would have turned the information over to the Saskatoon Police who had jurisdiction to investigate Miller's murder.

Pearson quickly developed a good rapport with Asper and communicated with him frequently throughout the investigation. Pearson felt it was important to let Asper know that he was on top of things and although he would not disclose confidential information relating to his investigation, he made sure that Asper knew what was going on. Asper told the Inquiry that he had a good relationship with Pearson.

Pearson's investigation of Fisher focused on finding evidence that would link Fisher to Miller's murder. Mere suspicion was not sufficient to link Fisher to the crime. He said it was a challenge to investigate a 21 year old crime, and particularly difficult to gather evidence in relation to Fisher's activities on the morning of January 31, 1969, because Fisher had not been investigated at the time.

Pearson's investigation focused on the following areas:

1. Linda Fisher – He interviewed Linda Fisher to verify the Sidney Wilson information. He questioned Linda about her recollection of the morning of the murder, and sought information that might connect Larry to the murder.
2. Larry Fisher's activities on January 31, 1969 – Pearson contacted Fisher's employers, family, friends, acquaintances and others who might have had information with respect to Fisher's activities on the morning of January 31, 1969. Many of these people did not have a specific recollection of that morning and were unable to provide helpful information. Fisher's work records were not available nor were any other records available from Workers' Compensation or any other agency that might establish that Fisher was not at work on the morning of January 31, 1969, as he claimed.
3. Larry Fisher – Pearson questioned Larry Fisher on a number of occasions. Before Pearson was able to talk to Fisher, Fisher had become aware that he was a suspect in Miller's murder, thus limiting Pearson's investigative options. Pearson sought information from Fisher that would either

link him to the murder or eliminate him as a suspect. Fisher's denial of committing the offence was not sufficiently credible and Pearson sought and obtained his consent to be polygraphed. The polygraph was unsuccessful due to Fisher's mental and physical state. Pearson also attempted to obtain his blood type to compare to the blood found in the frozen semen at the scene of the crime.

Before Pearson was able to interview Linda Fisher, he learned that Joyce Milgaard had already travelled to Battleford and spoken with Larry Fisher's mother and Linda Fisher. Having received the Fisher information on February 26, 1990, Joyce Milgaard had a two day head start on the RCMP and traveled to Saskatoon to look for Linda Fisher. She learned that Linda lived in Cando, Saskatchewan and after visiting Larry's mother Marie in North Battleford, she arrived at Linda Fisher's home on March 9, 1990. She was assisted by Henderson of Centurion Ministries. Henderson knew very little about the case, other than what he had been told by Joyce.

Marie Fisher was upset with the visit and called the RCMP in North Battleford to complain. Joyce Milgaard then visited Fisher's sister, Sylvia, who contacted Larry in the penitentiary telling him that he was being investigated by the Milgaards for Gail Miller's murder. This happened before Pearson was able to establish contact with Fisher.

On March 9, 10 and 11, 1990, Joyce Milgaard and Henderson met with Linda Fisher. Joyce taped most of the discussions. The interviews produced two written statements from Linda Fisher dated March 10 and March 11, 1990.

Linda Fisher was very cooperative and answered all of their questions. She refuted the "Sidney Wilson" story and said she did not see Larry come home on the morning of the murder covered with blood. Linda told them essentially the same story she told the Saskatoon Police in August of 1980, saying she suspected Larry may have killed Gail Miller. She related her recollection of the morning of the murder saying Larry was at home at around 9:00 a.m. or 10:00 a.m. in his good clothes, when he should have been at work. He had been out late the night before and she believed he had not come home. In the course of their argument, she heard a news report on the radio about the murder of the nurse. She had earlier noticed that her kitchen paring knife was missing. She accused Larry of "stabbing that girl".¹²⁸ She was not seriously accusing him, but rather made the comment in anger. She described Larry's reaction to the accusation as one of shock.

Linda Fisher described the knife to Joyce and Henderson as having a wooden handle with rivets, quite different from the maroon handled paring knife that was produced as the murder weapon in Milgaard's trial. She told Joyce Milgaard and Henderson that Larry would not have had a car at the time.

Joyce Milgaard asked Linda Fisher if she would visit Larry in prison wearing a hidden wire and ask him prepared questions. She declined, saying that she did not think Larry would talk to her in the jail. Joyce Milgaard and Henderson discussed their plans to use the media to coerce Fisher to confess, and suggested to Linda that they might be able to act as a liaison between Fisher and the Justice Department to try for a deal for Fisher if he confessed. They would threaten to "label him a killer all over mainland Canada, on every TV screen in the entire country".¹²⁹ Henderson said the following to Linda Fisher:

128	T15320; and Docid 050603.
129	Docid 043662.

While basically what ... what he is saying is that ... is that here's Larry in there. This Justice Department investigation is going on. The Justice Department is under no small amount of public pressure to get to the bottom of this, plus we're sitting here holding some cards of our own, developments that they don't even know about. If I were the lawyer, now he didn't quite get into this kind of detail but what I would do if I went up there is say look Larry, in addition to the fact that uh ... the Justice Department is hot on you, we've got more information and the national press is salivating over this case. You're going to be smeared all over Canada television and in ... in the ... press and that is going to put the Justice Department under even greater pressure to let David out and to prosecute you. I wonder if he's [sic] smartly ... say well he agreed with me, he said, there is enough evidence here, circumstantially to convict you. Now that may, or may not be true. But, in other words, and then he says, alright look, if you will confess to this. Admit the crime, what we might be able to do is work out a deal where you're not even prosecuted... He should be lead to believe that ... that ... if he is puking now, he's going to be passed out in a month from now when all this publicity hits the country. I mean um ...he's going to be public enemy No. 1... Well it can be handled quietly or he can be labelled a killer on T.V. and so everybody knows and the Justice Department is under extreme pressure to come after him.¹³⁰

Joyce Milgaard added that they would tell Larry "we'll talk to the Justice Department on your behalf. Make a deal for you, if you are willing to confess to it".¹³¹ Linda did not agree to participate.

After the weekend of interviews, she signed two statements that were drafted by Henderson. Even though she had described the missing knife to Henderson and Joyce Milgaard as being a wooden handled knife with rivets and a straight edge, neither statement contained a description of the knife. A maroon-handled paring knife was used to kill Miller.

On March 14, 1990, Pearson interviewed Linda Fisher and took a statement from her. Although Pearson was aware that Joyce Milgaard and Henderson had interviewed her, he did not have a copy of the statements prepared by Henderson. Pearson found Linda to be a very open and sincere individual who did not appear to be motivated by revenge and seemed sincerely concerned about the facts surrounding Miller's death. She told Pearson that the Miller murder had been on her mind since Fisher was convicted of rapes in Winnipeg in 1971, adding that she had told many people of her belief that Larry could have been involved, and telling Pearson of the statement she gave to Saskatoon Police in 1980.

Her statement to Pearson repeated basically what she had said to Saskatoon Police in 1980. She described the missing paring knife as her "potato knife"¹³² and that it had a wooden handle held together with rivets and did not have a jagged edge. She had noticed it missing either the night before or that morning but it had not been gone for long because she used it every day. She said that she never saw the paring knife again and was suspicious that this may have been the murder weapon.

On the evening of March 14, 1990, Pearson returned a telephone call from Asper. Asper told Pearson that he had been in Saskatoon the last couple of days with Joyce Milgaard and that he told Joyce to let authorities investigate the new evidence and to share her information with everyone. Asper expressed concern that she mistrusted everyone and had become somewhat of an independent investigator and

130	Docid 043662.
131	Docid 043662.
132	Docid 063204.

was reluctant to turn information over even to her own lawyers. Asper said that she was particularly mistrustful of the Saskatoon Police and in fact believed that there was a cover-up conspiracy by them.

On March 15, 1990, Asper forwarded to Williams a copy of the Linda Fisher statements taken by Joyce Milgaard. In his covering letter, he wrote, "We are encouraged that you have assigned this task to an investigator, and we feel that there are many leads that ought to be pursued. We are most willing to cooperate in any way with your office, and if you require any further assistance, please do not hesitate to call."¹³³

The next day Wolch wrote to Williams and he too enclosed copies of Linda Fisher's statement:

I would only re-emphasize that it is not our task to solve the crime 21 years later, even though it appears we may very well be able to do so.

As you can appreciate, being totally satisfied as to David's innocence, the matter becomes more frustrating as days go on. We are confident that any tribunal looking at this matter in its totality will without question come to the conclusion that David is innocent. Whether they can conclude that Fisher's guilty, only time will tell.

I have conveyed to Mrs. Milgaard our need to put our trust in you and allow you to carry out your duties. I am confident you can appreciate, however, that as the mother of a young man who has been wrongfully incarcerated for 21 years and who has met numerous obstacles, it is very difficult to maintain faith in a justice system that has let her family down so drastically. I look forward to hearing from you and we will continue to be of assistance wherever possible. Should your investigator require any type of information or assistance or whatever, we will cooperate fully.¹³⁴

On March 20, 1990, Joyce Milgaard sent her own letter directly to the federal Minister:

The officials in your department who are handling this case have not given me the slightest glimmer of hope. It has been over a year now since my son's application was filed and there has been no indication or communication as to what has been done. I will not stand by in the hope that the system which condemned my son will secretly help to free him. I am afraid I have lost faith in the justice system.¹³⁵

Joyce Milgaard told the Inquiry that by this time she had lost complete faith and confidence in the federal officials and the RCMP and was not prepared to wait for them to do the investigation and had decided to do it on her own. She thought they were all involved in a conspiracy against her son.

Pearson updated Asper on March 20, 1990, asking him to have Joyce Milgaard cooperate with the authorities and to let them follow up on the Fisher information instead of doing it herself. Asper informed Pearson that he had received a call from Linda Fisher the previous weekend indicating that she was going to the Prince Albert Penitentiary with Larry Fisher's mother to talk to Larry and ask him about the incident. Asper said he discouraged Linda from doing this but suggested that if she could get any cigarette butts or anything at all from Larry this would help with the blood type analysis. Pearson became concerned and phoned Linda Fisher asking if she had talked to Larry. She had not, but Larry's mother had and now "feels

133	Docid 050467.
134	Docid 155610.
135	Docid 009476.

much better"¹³⁶ having talked directly with her son about the recent revelations of his involvement in the Miller case. Obviously, Pearson noted, Larry was aware that he was being investigated as a suspect in Miller's murder.

On March 24, 1990, Williams interviewed Linda Fisher in North Battleford, asking her about her 1980 statement to the Saskatoon Police. She confirmed that she had been drinking when she gave the statement.

Asked about the morning of January 31, 1969, Linda said that she was not sure if Larry came home the night before, stating that he could have. She also said that she was not sure if he went to work on the morning of January 31, 1969. She said he might well have gone to work and come home because of the weather.

Linda was shown a photocopy of the Miller murder weapon. She described her missing knife as a wooden handled paring knife with rivets and a smooth edge. The murder weapon was a plastic maroon handled knife with no rivets and a jagged edge. She said that it was not her missing paring knife.

Williams questioned her about other possible explanations for Larry's shocked reaction when she accused him of the murder on January 31, 1969. She agreed that he could have been concerned about the earlier rapes he had committed and not the murder.

She confirmed that she had never seen any bloody clothes on Larry that morning, had never found any, nor could she say that any of his clothes were missing.

At the end of the interview, Linda Fisher told Williams that she had more doubts about Larry as the killer but she was still suspicious and wished that "Larry could be proved innocent or guilty".¹³⁷

(f) Interviews of Larry Fisher

On April 10, 1990, Pearson interviewed Fisher at the Prince Albert Penitentiary. As a result of Joyce Milgaard's earlier contact with Larry's ex-wife and mother, Fisher was aware that he was a suspect. This limited Pearson's "investigative tools".¹³⁸ Pearson told the Commission that had Fisher not been tipped off he would have considered the following steps to obtain credible admissions from Fisher:

- interception of communications;
- undercover officer in the institution.

The only factual thing Fisher could remember was that he had been questioned by the police shortly after the murder at the bus stop. Pearson described him as nervous but cooperative.

Fisher did not recall having an argument with Linda on January 31, 1969, but stated they fought so many times he could not recall one argument from the other.

He denied killing Gail Miller, stating that he had confessed to all of his crimes in the past. Pearson asked him to provide a blood sample, submit to a polygraph exam, and to make a statement or legal deposition. Fisher asked to discuss these requests with his lawyer before responding.

136	Docid 056743.
137	Docid 004930.
138	T19106.

Pearson made a written report to his superiors and to Williams on April 17, 1990¹³⁹:

1. Linda Fisher's description of her missing paring knife was different than the murder weapon. The murder weapon was a maroon handled plastic paring knife. Fisher's missing paring knife had a wooden handle with rivets.
2. There was nothing in the Saskatoon Police file indicating that Fisher was ever believed to be responsible for Miller's murder, the only note being the approach by the police at the bus stop on February 3, 1969. Linda claimed that Larry did not catch the bus on the morning of January 31, 1969 as Larry told the police however Larry denied this and said he was at work. An investigation of work records could not establish whether Fisher was at work on that morning.
3. They had been unable to establish if Larry attended work on the morning of Miller's murder and the information provided to Wolch by the informant was not corroborated by Linda Fisher and she had no recollection of Larry having blood on his clothes or misplacing or losing clothes.
4. There is nothing to indicate that Larry Fisher was involved in the murder of Gail Miller. The fact that David Milgaard and Larry Fisher were at the same residence on the day of the murder and that Larry Fisher is now known to have been a sex offender at the time, appears to be mere coincidence. While the circumstances create suspicion, the facts support very little at this point.
5. He would follow up with Fisher regarding his request for a blood sample, polygraph and deposition.

On April 20, 1990, David Asper told Pearson that Joyce Milgaard was coming home early from England and he expected that she was going to go public about the "inaction of the federal justice department".¹⁴⁰ Pearson responded that unnecessary publicity could possibly hamper the investigation and that there was a danger in having Fisher's name become subject of a press release, saying it would have no positive effect on the police inquiries. Pearson had taken all the steps he could and was waiting to hear from Fisher's lawyer before he could proceed with the deposition and polygraph.

Pearson was contacted by the warden of the Prince Albert Penitentiary reporting that he had recently been contacted by Joyce Milgaard. She told the warden that if something did not develop on the investigation there would be press stories and publicity, and that Larry had been interviewed three times by the RCMP and that he had not denied the offence. This was, of course, not true. She told the warden that her presence during the police interview with Larry would play on his mind and would assist in him confessing to the Miller murder. She was the "ace in the hole"¹⁴¹ and asked for permission from the warden to interview Fisher.

Neither Pearson nor the warden believed that she could assist in any way in the questioning of Fisher. On April 26, 1990, Asper informed Pearson and Williams that Joyce and David Milgaard had imposed a deadline of May 7, 1990, at which time they would go public regardless of the stage of the investigation. They could no longer wait.

Unknown to Pearson and Williams and despite what Milgaard's counsel were telling them, Joyce had disclosed all of the Fisher information including details of the RCMP investigation to a number of media sources.

139

DocId 004906.

140

DocId 056743.

141

DocId 056743 and T30734.

After receiving the May 7 ultimatum, Pearson contacted Fisher's lawyer again to set up an interview, polygraph and blood tests. Pearson felt obliged to go through the lawyer to get the interview, but then in light of the deadline, he went to the Prince Albert Penitentiary unannounced on May 7. Fisher was not aware, nor was his lawyer, that Pearson would be meeting him that morning. Pearson talked to him for about three to four minutes and Fisher indicated that he was ill. Fisher said he did not wish to do anything until after the May 19 weekend. Pearson told him that he needed to get a sample of blood and a statement as quickly as possible because there could be a public release by the Milgaards that would possibly point the finger at him.

In addition to the media, Joyce had also shared the Fisher information with Winnipeg Member of Parliament, John Harvard, who was part of the Milgaard team. Although he had been asked not to publicize anything about the Milgaard investigation, Harvard did so when questioning Minister Kim Campbell on May 10, 1990:

Madam Minister, the counsel for Mr. Milgaard tells me that the real killer has possibly been already identified. That the real killer is serving time in jail in Saskatchewan. That the RCMP have been apprised of this, in fact, the RCMP have interviewed this man twice. Can you comment on that? What do you know about that?¹⁴²

The next day the media widely reported this information. Joyce Milgaard explained to the Inquiry that Harvard was supposed to keep this information confidential and "blew it"¹⁴³ when he raised it in the House of Commons.

Asper followed up with a call to Pearson expressing concern that Joyce Milgaard had released information to the press about the RCMP investigation. Asper also warned Pearson that she had been in contact with the StarPhoenix reporter, Cam Fuller, and that he would soon be releasing a story.

Pearson reminded Asper that Fisher might refuse to cooperate if he was unfairly suspected, accused or made the subject of press releases and stories.

On May 24, 1990, Linda Fisher called Pearson expressing concern that Joyce Milgaard and Lett made a surprise visit to her at her school class in North Battleford, requesting a photograph of Fisher.

After talking to Joyce Milgaard, Linda Fisher told Pearson that she now remembered losing a second knife from her residence, a bone handled hunting type knife. The possibility of a bone handled hunting knife being used in the crime had been raised two months earlier by the Milgaards. In the original police investigation, such a knife was located in the back alley where Miller's body was found, a number of weeks after the murder. It was rusted and there was no evidence to connect this knife to the murder. The police provided the knife to Caldwell who in turn disclosed it to Tallis saying that he did not intend to tender it as an exhibit because there was no evidence to link it to Miller's murder. Tallis told the Inquiry that he did not want the bone handled hunting knife in evidence at trial, particularly because Wilson or John had said that David had a bone handled hunting knife on his trip to Saskatoon.

During the trial, Caldwell, with Tallis' agreement, returned the knife to Saskatoon Police.

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143

Docid 212997.
T30720.

In March 1990, Asper wrote a letter to Williams:

We reviewed the transcript of the preliminary Inquiry, and can confirm that a double-edged bone-handled hunting-type knife had been found at the scene of the crime shortly after police attended the scene. The police clearly believed that this knife might have had something to do with the crime, and the pathologist agreed that some of the wounds could have been inflicted with a double-edged blade. Oddly enough, this weapon was lost after being taken into police custody, and never played any part in the trial proceedings.¹⁴⁴

That was not so. The police did not believe the knife to be related to the crime, but having found it in the alley, turned it over to Caldwell. It was not lost after being seized by police and it never played any part in the trial proceedings because neither Caldwell nor Tallis viewed it as being relevant evidence. The knife was also the subject of a Saskatoon StarPhoenix story on March 15, 1990, entitled "Lawyer Digs Up More Data to Bolster Milgaard Request". The article states:

There is also the question of a missing knife. A double-edged, bone handled knife with a 7.6 cm blade was found near Miller's body on the day of the murder. But it disappeared before the preliminary hearing. A second knife was found in the spring when the snow melted. It was single edged. Asper said it would be "helpful" if it could be shown that the second knife presented by the Crown wasn't the murder weapon.¹⁴⁵

Pearson followed up with Linda Fisher and determined that her second missing knife was a steak knife and not a hunting knife. Linda was unable to say when the knife went missing. The knife turned out to be of no significance.

On June 8, 1990, Pearson visited Fisher in jail with his lawyer and Fisher agreed to give a legal deposition stating that he wanted to answer questions only once. Pearson, accordingly, made arrangements for the legal deposition.

On June 19, 1990, Linda Fisher called Pearson again expressing concern that the Winnipeg CBC crew were at her home asking her to tell her story. She refused and later her 15 year old son apparently allowed the CBC reporters into her house after they spent several hours outside the building. Her son eventually allowed the reporters to take photographs of Fisher. Linda complained that the CBC took advantage of her son after being told that they did not want to be interviewed.

On June 22, 1990, CBC ran a story identifying Larry Fisher as the killer of Gail Miller, and other media followed suit.

In a letter dated June 22, 1990, from Asper to Bruce MacFarlane, Williams' superior, Asper explained the "change in rules" relating to the media:

Unfortunately, the rules seemed to have changed somewhat with the broadcast by the CBC and its story relating to and naming Larry Fisher. Many people in the media have assisted us in our investigation at various stages along the way. They became privy to confidential information which we have successfully dissuaded them from publishing up until this point. However, the problem of competition has crept into the picture and I am advised that the media is now taking the position that all deals are off. I expect that over

the next couple of days a variety of stories will be published and/or broadcast with respect to Albert Cadrain's psychiatric condition both currently and at the time of the trial. I cannot speculate what else might be published, but as I say, we unfortunately cannot exercise any further control over this situation.

We are being inundated by the media to respond to all of these matters, and I can assure you that we will not be taking positions adverse to the Department of Justice.¹⁴⁶

On July 9, 1990 Fisher agreed to a polygraph test, but because of his medical and emotional state the polygrapher could not obtain readings capable of interpretation. After the CBC documentary identifying Fisher was aired on June 22, 1990, Fisher had been threatened by fellow inmates. It was a breach of the prisoner's code to let someone else do your time. Fisher claimed to be "afraid for his life"¹⁴⁷ and this nervousness coupled with his medical problems made him an unsuitable candidate for a test.

Pearson followed up with the polygraph operator, Michael Robinson to determine whether a second test could take place. Robinson reported that Fisher was nervous as he feared for his safety because of the publicity over him being a suspect. Although efforts were made, Fisher refused to undergo a further test.

On July 12, 1990, Williams and Pearson questioned Fisher under oath in the presence of his lawyer. Fisher told him that he recalled being interviewed by the police in February 1969 at the bus stop and that he had told them the truth. He remembered the argument with Linda but he could not recall when or what it was about. He said he was shocked at the time because his wife was making such an accusation.

Williams questioned him briefly about his earlier assaults and if he had a brownish red plastic handled paring knife. Fisher replied that he could not remember but acknowledged using a paring knife in some of his assaults.

He repeatedly denied any involvement in Miller's murder. Williams asked:

People are going to say to me look it, you got two people. You've got a fresh faced 16 year old kid no criminal record who has been sitting in jail for 21-22 odd years and he says he didn't do it. He says he didn't stab this woman. And we've got another guy whose got six rapes, one indecent assault and his M.O. is similar to that which surrounds the death of Gail Miller. Faced with that Williams don't you think you've got the wrong guy in jail because the real killer is Larry Fisher.¹⁴⁸

Fisher responded "no way".¹⁴⁹ When asked about the recent media coverage suggesting that he had killed Miller, Fisher responded, "Wouldn't you convict me if you seen my charges on TV stating that I was in the area? Anybody would".¹⁵⁰

Williams and Pearson continued efforts to have Fisher undergo another polygraph test, but as a result of the media attention, he was moved to a British Columbia prison for his safety.

146	Docid 009487.
147	Docid 011840.
148	Docid 061960.
149	Docid 061960.
150	Docid 061960.

(g) John Patterson Report

On July 30, 1990, the CBC broadcast a news story claiming that "a former inmate claims Fisher made a chilling confession"¹⁵¹ in reference to the Miller murder. The inmate, who had asked to remain anonymous called the CBC after hearing news stories alleging that Fisher was the person responsible for Miller's death. The CBC provided the inmate's name to Asper and he called the former inmate and asked if he would do an interview with the Globe & Mail. The inmate, John Patterson, refused but said that he would talk to the federal Justice investigator.

On August 1, 1990, the Globe and Mail ran a story headlined "Wrong Man Jailed In 1969 Rape Case, Ex-convict Says". The story was based primarily on information from Asper.

Wrong man jailed in 1969 rape case, ex-convict says

Justice officials want to talk to Regina resident who claims another man tacitly confessed to crime

BY DAVID ROBERTS
Manitoba Times

WINNIPEG — The federal Justice Department wants to talk to a former convict who says the wrong man has been behind bars for 20 years for the 1969 rape and of a Saskatoon nursing assistant.

The ex-prisoner, who now lives in Regina, said the likely killer, a convicted rapist, gave him a tacit jail-house confession in 1977.

Eugene Williams, a Justice Department investigator, and the Royal Canadian Mounted Police recently interviewed a convicted rapist in connection with the 1969 slaying of Gail Miller, whose stabbed and froze body was found in a Saskatoon snowbank on Jan. 31, 1969.

David Milgaard, 38, was convicted of the murder in 1970. Ms Miller was sexually assaulted and stabbed repeatedly with a paring knife.

Mr. Milgaard, who twice escaped from prison and once was recap-

tured in Toronto after a police shootout, has protested his innocence throughout the 20 years he has served of a life sentence. He is at Stony Mountain Penitentiary north of Winnipeg.

Mr. Milgaard's family, his lawyer and a private investigator have been pressing the Department of Justice for a new trial.

In the past year, several witnesses at Mr. Milgaard's 1970 trial have either recanted their testimony or said they were pressed by police to implicate Mr. Milgaard. One juror said he was mentally unfit to serve on the jury that convicted Mr. Milgaard. Forensic evidence used in the trial also has been scrutinized by experts and found to be wanting.

Mr. Milgaard's mother and other members of his family recently stepped up media pressure on federal Justice Minister Kim Campbell in an effort to obtain a new trial.

Mr. Milgaard's Winnipeg lawyer, David Asper, also has disclosed to the media a series of circumstantial

facts that he feels link a convicted rapist to the Miller slaying.

The latest development occurred Monday when a Regina man told CBC television that a former prison inmate — the same man that Mr. Asper and Mr. Milgaard point to as the likely killer — gave him a tacit confession about 13 years ago.

William Corbett, senior counsel for the Justice Department's criminal prosecutions branch, said yesterday that the department wants to discuss the Regina man's allegation. Mr. Asper said Justice Department officials may travel to Regina by the end of the week.

Mr. Corbett noted that, as Mr. Milgaard's supporters provide the department with new evidence on almost a monthly basis, the review of the case has slowed. He had hoped to brief Ms Campbell on the matter by the end of August, he said, adding that there is no clear-cut evidence to suggest that Mr. Milgaard was intentionally dealt a judicial travesty in 1970.

"Seventeen per cent of people

still believe Elvin Frelley is alive," Mr. Corbett said in an oblique reference to those who believe in Mr. Milgaard's innocence.

He was quick to add that the department wants to ensure that the Justice Minister receives a full and objective briefing before making a decision on Mr. Milgaard's case. Mr. Corbett also said "there is lots of circumstantial evidence" against the second man.

Included in that evidence, provided to Justice officials by Mr. Asper, are allegations that the suspect has a record of violent rapes with paring knives, lived in the basement of the same home that Mr. Milgaard visited in Saskatoon on the day of the killing; lied to police about his whereabouts on the day of the killing; lost his wallet, which was found near Ms Miller's wallet; used to take the bus to work with the murder victim and failed to arrive at work on the day of the killing.

Mr. Asper said, the ex-convict in Regina, who refused to be identi-

fied, said he served time at Prince Albert Penitentiary with the rapist in 1977.

He said the Regina man, a convicted armed robber, has had a clean record since his release in 1978 and is eager to give Justice Department investigators his story of the rapist's confession.

The man told Mr. Asper that he and the rapist were playing hockey one night in prison and got into a stick-swinging duel. The rapist threatened to stab him and dump him in a snowbank.

"I did it before and got away with it, I can do it again," the Regina man said the rapist told him.

The Regina man told Mr. Asper that his recollection of the admission is vivid. He is coming forward 13 years later because a recent television documentary about the Milgaard case reminded him of the hockey game and rapist's comments.

"My motive is that an innocent guy is in jail," Mr. Asper said he was told.

On August 4, 1990, Williams interviewed Patterson under oath with Patterson's legal counsel present. Patterson told Williams that the original CBC news story took his words out of context. He said that he and Fisher had an altercation during a prison hockey game and that Fisher threatened him. Patterson did not interpret the threat as a confession that Fisher had killed anyone. Fisher did not confess to anything with respect to Miller.

Patterson said that after he called the CBC he was contacted by Asper. Patterson denied telling Asper that Fisher gave him a confession. Patterson denied that Fisher told him "I did it before and got away with it and I can do it again"¹⁵² and denied that he said those words to Asper as reported in the Globe article.

151	DocId 012681.
152	DocId 039507.
153	DocId 016762.

Patterson denied saying "My motive is that an innocent guy is in jail".¹⁵⁴ He also denied saying that "he can't rest now that he believes an injustice may have been done to David Milgaard".¹⁵⁵

Williams concluded that the information reported in the media was incorrect and that Fisher had not made a confession of Miller's murder to Patterson.

(h) Consideration of Similarities of Fisher Assaults and Miller Murder

It was initially believed by the Milgaards, Williams and the RCMP that Fisher's 1971 rape convictions were Regina offences. In fact, the rapes occurred in Saskatoon but Fisher was sentenced in Regina and his criminal record noted them as Regina convictions. In early July 1990, it was discovered that the Regina convictions related to four offences that occurred in Saskatoon and three of the four offences were in the months preceding Miller's murder and two within six blocks of where Miller was murdered.

On July 5, 1990, Wolch wrote to Williams following up on the information he had provided regarding the location of the Fisher assaults. In his letter he states:

Pursuant to our telephone conversation of July 4, 1990, I wish to emphasize again how strongly we feel that this matter must proceed expeditiously. There is simply no doubt at this point in time that David Milgaard is innocent.

This will also confirm that we are most anxious to receive all the details regarding the seven other serious sexual assaults committed by Larry Fisher. As I indicated to you, we have the names of the victims so it is not a matter of prying into their personal affairs, but rather we are interested in looking at patterns and similar acts, etcetera.¹⁵⁶

Williams and Pearson had already reviewed the investigation file for Fisher Victim 7 and had received partial information from Fisher's Fort Garry assault files. They had reviewed these assaults looking for similarities to the Miller murder. Upon learning that the four Regina convictions were Saskatoon offences, Pearson contacted the Saskatoon Police again and requested the investigation files providing the names of the victims (which is how the files were catalogued). The only file that the Saskatoon Police could locate was part of the Fisher Victim 4 assault file. The police could not locate the files for the remaining assaults. Williams was able to obtain some details of these assaults from the court files and prison records.

Williams informed Wolch that only one of the four Saskatoon assault files could be located, and full details of what he had gathered about the offences was provided to Milgaard's counsel at a meeting on October 1, 1990 when Williams' entire investigation was reviewed with them.

Williams reviewed the Fisher assaults to determine whether there was anything unique in the modus operandi that was strikingly similar to the manner in which Miller was raped and murdered. Williams considered whether any of Fisher's previous assaults would be admissible evidence in a prosecution of Fisher for the Miller murder. Evidence of previous criminal offences committed by an accused is considered highly prejudicial and normally not admissible unless the prosecutor can establish that there is a high degree of similarity between the previous offences and the offence before the Court.

154 Docid 016762.

155 Docid 016762.

156 Docid 010033.

Both Williams and Pearson testified that similar fact evidence, on its own, would not be sufficient to link Fisher to Miller's murder. Further evidence connecting Fisher to the crime, by way of a witness, physical evidence or a confession would be required before there would be any basis to charge Fisher for the murder.

Williams examined the records he had relating to the Fisher offences which consisted of the prison records and the available occurrence reports to determine whether the circumstances of the crimes for which he was convicted bore any similarities to the circumstances surrounding Miller's death.

Williams testified that the three sexual assaults prior to Miller's death did not have the same level of violence as the Miller murder and that it wasn't until 11 years later (Fisher Victim 7) that the level of violence approached the Miller murder. Williams also concluded that the time of day and location of the sexual assaults were not similar to the Miller murder and there did not appear to be any "identifying element"¹⁵⁷ other than the use of a knife, which was fairly common in rapes.

Williams did not think it was necessary for him to interview any of the victims. He had sufficient details of the crimes from existing documents that allowed him to make comparisons. He testified that if the threshold of similarity had been met, interviews of the victims would have been informative. Williams conceded that in hindsight he would have been able to do a better evaluation of the similarities if he had interviewed the victims, but in light of what was later learned from the victims, he did not think it would have changed the conclusions he had reached on the first application.

(i) Conclusions of Eugene Williams

Williams completed his investigation of the Fisher ground in August 1990. His findings and conclusions are summarized in his August 28, 1990, report to MacFarlane:

Additionally I examined his prison records and the available occurrence reports relating to his convictions to determine whether the circumstances of the crimes for which he entered pleas of guilty, bore any similarities to the circumstances surrounding Ms. Miller's death. They were not similar.

...

When interviewed under oath, Mr. Fisher denied any participation or involvement in the death of Gail Miller. The evidence of Linda Fisher, and the other circumstantial evidence does not link Larry Earl Fisher to the murder of Gail Miller.¹⁵⁸

Williams concluded that there was no evidence to link Fisher to Miller's murder and no merit to this ground of Milgaard's application. Despite this conclusion, Pearson continued with his efforts to have Fisher submit to a further polygraph exam. In a report dated August 28, 1990, from Pearson to his RCMP superiors and Williams, Pearson concludes:

To date we have been successful in gaining the cooperation of the suspect Larry Fisher. There is nothing determined which would suggest that he was involved in the death of Gail Miller. Mr. Fisher has not been eliminated as a suspect, and as mentioned previously, efforts will continue to have a polygraph re-test....

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T38972.
Docid 004374.

At the time of this report, Larry Fisher has not been eliminated as a suspect, even though he has agreed to answer all questions that we have for him. The investigators are at a disadvantage when dealing with Mr. Fisher, as we have no information on his movements at the time of Gail Miller's murder. We've been unable to challenge Fisher's honesty, as a valid polygraph is absolutely essential if he is to be cleared as a suspect.¹⁵⁹

Both Williams and Pearson told the Commission that although they remained suspicious of Fisher, without a further polygraph there was little further evidence that they could gather that would link Fisher to the crime. Fisher refused to undergo a second test.

(j) Second Fisher Ground

In September 1990, the Milgaards were asked by Williams to summarize their final position with respect to their application. In a letter from Milgaard's counsel dated September 10, 1990, a new Fisher ground was formally introduced:

Added to this evidence, we have provided you with the identity of the person who is very likely the true killer. At the very least, the undisputed fact that a serial rapist was operating in Saskatoon at the time of the Gail Miller murder, and that this rapist had attacked at least two women who resided in the neighbourhood where Gail Miller was murdered, would have been very relevant at the trial. We have communicated with Justice Tallis, and he advises that he was never made aware of the fact that these rapes were occurring in such short proximity before the Gail Miller murder. The jury was never given the opportunity to consider that Milgaard might not be guilty because another person who had committed two rapes and an indecent assault was on the loose in Saskatoon and that this person might be responsible.¹⁶⁰

The new ground asserted that Milgaard did not receive a fair trial because evidence of the prior rapes (which the Saskatoon Police at first thought were committed by the same person as Miller's murderer) was not provided to his trial counsel before his criminal proceedings were concluded. If this information had been made available to Tallis, and presented to the jury, Milgaard might have been acquitted. Furthermore, before Milgaard's criminal proceedings were concluded, the Crown became aware that Fisher was the perpetrator of these assaults. If Tallis had been able to present evidence of the rapes, their similarity to Miller's murder, Fisher's responsibility for the rapes and the fact that Fisher resided in the Cadrain basement at the time, the jury might have reached a different verdict.

The two Fisher grounds were quite distinct. The first ground (Fisher is the perpetrator) required evidence to link Fisher to Miller's murder. The second ground did not, and it was not necessary to establish that Fisher killed Miller or that Milgaard was innocent. Rather, the argument depended on establishing that Milgaard's conviction was likely a miscarriage of justice, because there was evidence not disclosed or not available to Milgaard's counsel, which, if presented at trial, might have affected the jury's verdict.

In the latter case, given the sexual nature of the Miller attack, the fact that a sexual predator (not Milgaard) had recently been active in the area, was relevant. It might well have been admissible as a third party perpetrator defence without showing the striking similarity between the Fisher assaults and the Miller murder, which a prosecutor would need to show as proof of Fisher's guilt.

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Docid 002369.
Docid 004394.

Williams considered the likely effect of the fresh evidence of the Fisher assaults upon the Milgaard jury. In his view, the case against Milgaard at trial remained essentially intact, despite the grounds advanced in the application, so the fact that the jury did not hear evidence about the Fisher assaults was not likely a miscarriage of justice. It is arguable that he employed the prosecutor's onus as a test in reasoning that the similar fact evidence would not be admissible as defence evidence.

The second Fisher ground was easier to establish than the first, but it did not receive much attention and for the most part was lost in the media campaign aimed at identifying Fisher as the real killer. The first Fisher ground seems to have been uppermost in the mind of the Minister in rejecting the application, and there is a strong argument to be made that not enough attention was paid to the possibility of a miscarriage of justice, arising from a missed opportunity to raise a defence of a third party perpetrator.

2. Albert Cadrain and Ron Wilson Statements June 1990

(a) Introduction

Milgaard's December 28, 1988 application to the federal Minister did not assert any ground related to the evidence of Cadrain and Wilson. There was no suggestion that these witnesses were improperly treated by the police, nor that their evidence contributed in any way to a miscarriage of justice. As a result, Williams' investigation of the application did not, initially, include interviews of Wilson or Cadrain.

In May, 1990, the Milgaards engaged Henderson, a private investigator with Centurion Ministries to interview Wilson, John and Cadrain. Statements were obtained from Wilson and Cadrain, sent to the media, then filed with the federal Minister supplementing Milgaard's application. John refused to be interviewed.

In his statement, Wilson purported to recant his incriminating trial evidence, claiming that police manipulated, coerced and brainwashed him to lie at trial. Cadrain did not recant his trial evidence, however he claimed that police put him through "hell and mental torture"¹⁶¹ and used improper means in their questioning. Both statements received a great deal of publicity including accusations by the Milgaards of misconduct on the part of the police and the Crown prosecutor in their dealings with Wilson and Cadrain.

Williams investigated the new grounds but believed the statements were geared more towards attracting media attention than providing a basis for a remedy from the federal Minister. The federal Minister ultimately determined that the statements had little or no credibility and did not establish a likely miscarriage of justice.

(b) Decision to Interview Albert Cadrain, Ron Wilson and Nichol John

Neither Wolch nor Asper interviewed Wilson, Cadrain or John prior to filing Milgaard's application. The transcripts of Joyce Milgaard's 1981-1983 interviews of these witnesses were not included or referred to in the application. Asper told the Commission that based upon her earlier interviews, they did not think these witnesses would be cooperative and so did not interview them. The cover letter to the application referred to John's May 24, 1969 statement and the assertion that "it cannot possibly be true",¹⁶² prompting Williams to interview John as part of his investigation of the application. Even though

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Docid 333466.

162

Docid 000002.

the application did not put Wilson and Cadrain's evidence in issue, Asper expected Williams to interview them.

Williams said, however, that it was the responsibility of the Milgaard counsel to interview witnesses if they wanted their evidence to be part of the application. As counsel to the Minister, Williams said that he had neither the ability nor the mandate to investigate all of the evidence led at trial. Instead, he focused only on the grounds advanced by counsel – and in this case, experienced counsel. So Milgaard's counsel would have identified it.

In May 1990, the Milgaards decided to interview Wilson, John and Cadrain. Asper explained that Williams had the Fisher information and they "weren't satisfied with the pace with which it was being digested by the Department of Justice"¹⁶³ and since they were not getting any sort of conclusions, they decided to "just pull out all the stops"¹⁶⁴ abandoning any thought that "Justice was going to work with us".¹⁶⁵

McCloskey of Centurion Ministries offered the services of Henderson who had assisted Joyce Milgaard a few months earlier with her interview of Linda Fisher.

In their U.S. cases, Henderson explained, Centurion conducted an exhaustive screening process for applicants seeking to remedy claims of wrongful conviction, accepting only those thought to be innocent. Once engaged, Centurion would conduct their own investigation of every aspect of the case, obtaining all police, prosecution and defence files, interviewing defence counsel and then the key trial witnesses in search of grounds to support the application.

Centurion was not engaged until well after Milgaard's application was filed, and then only for specific assignments. Henderson said that interviewing Cadrain, Wilson and John was "pretty obvious"¹⁶⁶ and a "no-brainer"¹⁶⁷ since it was their testimony that was largely responsible for Milgaard's conviction. Had Centurion been engaged at the outset, he said it would have been one of their first steps.

Henderson travelled to Canada in the latter part of May 1990 to meet with Joyce Milgaard and Asper and plan the interviews of Wilson, John and Cadrain, who were quickly located, and were residing in various parts of British Columbia.

It was agreed that Henderson would conduct the interviews given that he was an experienced investigator and had particular experience in convincing witnesses to recant. They discussed having Lett attend the interviews as a reward for his support. Lett declined the invitation, fearing it could put him in the position of being a witness and preclude him from writing about the interviews. Henderson went alone, but they decided to give Lett the witness statements before sending them to other media outlets and federal Justice officials, so that he could conduct interviews and write a story.

Although Henderson had participated in the interview of Linda Fisher two months earlier, he knew very little about the police investigation, and Milgaard's trial.

He relied upon Joyce Milgaard and Asper for background information. After completion of the Fisher interviews on March 11, 1990 he returned to Seattle, believing his work to be finished.

163	T26840.
164	T26841.
165	T26841.
166	T22510.
167	T22511.

When McCloskey asked him to help with further interviews in May, he had done no additional review of the case and had no information about Wilson and Cadrain except for their trial transcripts. He did not have their 1969 witness statements, nor transcripts of their interviews with Joyce Milgaard. He was unfamiliar with Canadian criminal law and the s. 690 process. For the facts of the case he relied on a 1986 draft of Milgaard's s. 690 application, which reflected counsels' view of the facts at the time, and he heard their version of the case from Joyce Milgaard and Asper. He did not, however, speak to David Milgaard to hear his story, and had no idea what he had told his lawyer in 1969 about the events of the morning of January 31, 1969.

Thus, unencumbered by the facts, he formed the view before even speaking to Wilson or Cadrain that they had lied at trial, and that their incriminating evidence was the result of police misconduct, manipulation and coercion. Henderson said that his belief was based upon Milgaard's innocence, and that his friends would not have lied unless coerced by the police. He knew very little about the police interaction with these witnesses, and the evolution of their evidence.

Henderson explained that witnesses need someone to blame for their lies if they are to recant. He supplied the out for them, in the form of police misconduct and coercion, which he had been led to expect from his U.S. experiences.

He did not review in detail what the witnesses had said at trial nor did he consider whether any of their evidence could have been true, notwithstanding Milgaard's innocence. For example, he did not ask himself whether the small amount of blood Cadrain said he saw on Milgaard's pants might have been unrelated to Miller's murder. Without knowing what Milgaard had told Tallis in 1969 about his actions that morning, Henderson simply assumed that any incriminating evidence from other witnesses were lies, for which the police were responsible.

Henderson wanted information for the media campaign, then in full force. His purpose was to pressure federal Justice officials and to sway public opinion.

(c) Interviews of Cadrains

On May 24, 1990, Paul Henderson telephoned Dennis Cadrain. He said he was assisting David Milgaard and that they had evidence to show very clearly that Fisher was the person who committed the crime:

We know what happened to Albert, we know what happened to Nichol, and Ron Wilson, they were, they had, a lot of pressure put on them by the police back then. They were kids. They were children and they were manipulated, coerced, threatened, a lot of things happened to them that should not have happened to people.

...

Larry Fisher is under a lot of pressure to confess. The RCMP is talking to him....Now, we've heard today that he's confessed. That may be true or may not be true, it may be rumor, it may be a fact, but, if he has confessed or if he confesses down the line, which I think he probably will, because he is the type B rapist personality... But he is going to, we think, down the line ah; because the RCMP is convinced that he's the person. Now when he does, what that means, is that all the witnesses against David Milgaard suddenly become liars. Now here is Albert's chance to beat them to the punch. Come forth and say, the bastards made me do it. And I feel badly about it and I want to clear my conscience

and help this guy that I have been worried about, heartsick about all these years. He was my pal, the pricks made me do it.¹⁶⁸

Henderson told the Commission that he later used this same approach with Albert Cadrain and Wilson, admitting that he had no evidence of manipulation, coercion or threats by the police and no factual basis to back up the statements made to Dennis, and later to Albert and Wilson. He simply assumed that improper police conduct caused them to lie, and this pervaded his interviews with Wilson and Cadrain which produced statements to fit his theory.

Two days after the call, Henderson met Dennis and Albert at a restaurant in British Columbia where he presented a strong case for Fisher's guilt. Albert confirmed his trial testimony, in particular about seeing blood on Milgaard's pants, saying "I can't change my story because if I do it is a lie. I'm not changing my story – I won't lie for the devil".¹⁶⁹ Dennis told Henderson that Albert truly believed what he had said at trial and that for him to recant his testimony would be for him to lie.

Seeing no chance of a recantation, Henderson did not take a statement from Albert, but rather changed tactics. Observing Albert's troubled emotional and mental state, Henderson decided to build a case of mental illness during the investigation and trial, affecting the credibility of the trial evidence given by Albert. Alleging, as a vulnerable witness, he had been taken advantage of by the police who coerced him into giving false evidence. From Dennis Cadrain, Henderson learned that after the trial, Albert was hospitalized and diagnosed as schizophrenic. As well, Albert reportedly told Dennis that he had seen a vision of the Virgin Mary in the clouds standing on a serpent with the head of David Milgaard. Dennis also told Henderson that police questioning of Albert took a significant toll on him.

After the first interview, Henderson reported to Joyce Milgaard that Cadrain was "a witness that they had very likely coerced, planted, programmed, into believing these things."¹⁷⁰ He also advised Asper that "If we can show that he was not mentally competent to testify 20 years ago, Saskatoon Police look real bad and the Crown is over a barrel".¹⁷¹

Henderson's coercion theory was not supported by the facts. Cadrain, after all, came to the Saskatoon Police voluntarily and provided incriminating evidence against Milgaard. There was no police pressure on him to give incriminating evidence.

Henderson acknowledged to the Inquiry that at the time of his interviews he was not aware that Cadrain initiated contact with the Saskatoon Police and provided his first statement at a time when the police knew nothing about Milgaard.

Henderson obtained a statement from Dennis stating that Albert told him at one point that police were questioning him as though he were a murder suspect. At the time Dennis said he had no reason to believe that what Albert told the police was not true. In fact, Dennis encouraged Albert to go to the police on March 2, 1969. Only later did he have serious concerns about Albert's credibility. He was prone to exaggeration and suggestion, and Dennis said he could easily be coerced and manipulated by police, saying to Henderson "If ideas were planted in Albert's mind it is quite possible he would come to accept them as the truth. Frankly, I would not consider my brother to be a reliable witness at that time."¹⁷²

168	DocId 050412.
169	DocId 154605.
170	DocId 301838.
171	DocId 154605.
172	DocId 016475.

Dennis did not say that police had planted ideas in Albert's mind but indicated that he was the type of person who might be susceptible. Albert had told his family that he saw blood on Milgaard's pants before he ever talked to the Saskatoon Police.

Albert had been picked up for vagrancy in Regina in early February 1969. Although Regina Police mentioned the Miller murder to Albert because he lived nearby, they were not investigating the murder and did not question Albert as a suspect. Neither were they aware of Milgaard, who was nobody's suspect at the time, and there was no evidence that they suggested anything to Cadrain about Milgaard.

On June 6, 1990, Milgaard counsel provided a copy of Dennis' statement to Eugene Williams stating that Williams should contact him for further information, adding "Dennis tells us that Albert suffered from serious psychiatric infirmities during the course of the Milgaard investigation which ultimately resulted in his committal to the psychiatric care unit at University Hospital in Saskatoon."¹⁷³ Williams treated the letter as an additional ground to the application. The letter, also referring to the Wilson statement, states, "we take the view that the enclosed statements provide further dramatic proof of the wrongful conviction of David Milgaard. It is unfortunate that your office did not speak with these people at the outset, even if only to confirm their evidence".¹⁷⁴

In response to the letter and Dennis' statement, Williams interviewed Dennis on June 11, 1990 and Albert on June 15, 1990. Albert reviewed his March 2 and 5, 1969 police statements and stated "emphatically and affirmatively"¹⁷⁵ that he told the truth when he was a witness at the trial.

Albert acknowledged to Williams that he had spent two months in a psychiatric facility during which he received shock and drug treatments saying he checked himself in after being persuaded to do so by Dennis in 1973. Albert said the repeated questioning by police and their apparent disbelief of his initial statement incriminating Milgaard, coupled with suggestions that he himself might have been involved in the murder, were very distressing.

Williams asked Albert about his recent interview with Henderson. According to Albert, after he told Henderson that his trial testimony was accurate, Henderson did not appear to be very interested in what he had to say and conversed primarily with Dennis.

In his memorandum following the interviews, Williams concluded:

Neither the timing nor the nature of Albert Cadrain's emotional instability is clear; nor is the motivation behind Dennis Cadrain's current statement. Dennis Cadrain had accompanied Albert to the police station on March 2, 1969 and had given a statement to the police in which he quoted Celine as saying that David Milgaard wanted to get out of town right away. From Dennis' personal assessment of Milgaard, which was obtained during Milgaard's first stay, he described Milgaard in 1969 as a "real goof".

The timing of the statements of Dennis Cadrain and Ron Wilson, a few days before David Milgaard's parole hearing, coupled with the parting statements of Albert Cadrain suggest to the writer that fear of retribution may have motivated Dennis to attempt to shield or excuse Albert. Although Dennis Cadrain did not testify, and is younger than Albert, Dennis regards himself as Albert's guardian. The prospect of Milgaard's release and possible

173 DocId 333459.

174 DocId 333459.

175 DocId 000836.

angry retribution may explain Dennis' attempt to distance Albert as a reason for Milgaard's imprisonment. Each of David Milgaard's travelling companions that this writer has interviewed still fear him, even though over twenty years has elapsed.¹⁷⁶

On June 24, 1990, Henderson visited Albert again and wrote a statement for him. Although not recanting any of his incriminating trial evidence, the statement was silent about observations of blood on Milgaard's clothing. Instead it focused on police misconduct. Albert described his treatment by the police as abusive, saying:

As I can best recall, I was picked up by police and questioned 15 to 20 times. I remember two detectives in particular, Karst and Short, working me over. They worked like a tag team; one would be the bad guy and the other would act like he was my friend. The bad guy would scream at me then the other would offer me coffee and cigarettes. Then they would switch roles.

They asked me the same questions repeatedly, time after time after time, until I was exhausted and couldn't take it anymore. This went on for months, continuing through the preliminary hearing. They put me through hell and mental torture. It finally reached the point where I couldn't stand the constant pressure, threats and bullying anymore. As a result of the abusive treatment, I developed serious stomach ulcers and was actually spitting up blood for a long period of time.

...

From the evidence, it now appears that David Milgaard is innocent. To know that my testimony helped cause him to spend all these years in prison only adds to the stress and burden I've been carrying through my entire adult life.

I feel that the Saskatoon Police did a terrible thing to me 20 years ago. My life has never been the same and it never will be. Those detectives pushed me over the edge and I cracked.¹⁷⁷

Henderson told the Inquiry that in drafting the statement "it was particularly necessary in Albert's case for me to supplement his vocabulary".¹⁷⁸ Although he said the words "hell and mental torture"¹⁷⁹ were Albert's.

Dennis told the Inquiry that prior to meeting Henderson, Albert had not discussed his dealings with the Saskatoon Police, but that after meeting Henderson, Albert started to say "worse things".¹⁸⁰

Investigators wondered how the detectives pushed Albert over the edge and caused him to crack when his incriminating evidence was volunteered to the police and did not change substantially from the moment he first arrived at the Saskatoon Police station until he testified at trial. The statement was clearly crafted to play in the media and to focus attention on police misconduct. It provided no valuable or credible information challenging Cadrain's trial evidence. Albert did not recant his evidence about seeing blood on Milgaard's clothes.

176	Docid 000836.
177	Docid 000229.
178	T22850.
179	T22853.
180	T02593.

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Williams told the Inquiry he approached Albert's statement "with a certain degree of skepticism".¹⁸¹ He was concerned with "some embellishments"¹⁸² which were designed to capture the attention of the reading or viewing public, and he viewed it as more designed for the media than a legal ground.

In subsequent years, Albert told RCMP investigators that he gave the statement to Henderson simply to get him off his back.

181	T34580.
182	T34580.

Albert's statement was provided to the media before it was received by Williams. On June 26, 1990, Lett ran a story in the Winnipeg Free Press:

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WINNIPEG F-P JUNE 26 1990

Milgaard witness says detectives 'tortured' him

By Dan Lett

The star witness from David Milgaard's trial said he was psychologically tortured by Saskatoon police officers until he suffered a mental breakdown and was committed to a hospital psychiatric ward.

Albert Cadrain, in a statement given to a private investigator working for Milgaard's family, said he was grilled unrelentingly by Saskatoon police officers Eddie Karst and Charlie Short for weeks in the spring following the 1969 murder of nursing assistant Gail Miller.

The result, Cadrain said in his

statement, was almost total mental collapse.

"Before I walked into that police station I was a happy, normal kid," Cadrain said. "My life has never been the same and it never will be. Those detectives pushed me over the edge and I cracked."

In January 1969, Miller's half-naked body was found face down in a snowbank. Evidence presented at the trial indicated she had been raped and stabbed.

Milgaard was in Saskatoon that morning driving around with two friends looking for Cadrain's house. Milgaard arrived at about 9 a.m. and

after spending a few hours with Cadrain, the four left on a trip to Alberta.

Cadrain never made mention of the murder to police when he was questioned about it by police in Regina a few weeks later, after having been arrested for vagrancy. However, one month after the crime he went to Saskatoon police and told them he saw what appeared to be blood on Milgaard's clothing. He was subsequently given a \$2,000 reward for providing the information.

Cadrain detailed his experiences See WITNESS page 4

Witness 'scarred' by questioning

continued from page 1

at the hands of Saskatoon police to Paul Henderson, a private investigator lent to the Milgaard case by Centurian Ministries, a U.S.-based non-profit organization that investigates cases of wrongful conviction.

Cadrain — referred to many times by Saskatoon Crown T.D.R. Caldwell as the "hero" of the case — said in his statement that police questioned him 15 to 20 times, often interrogating him more than 12 hours on each occasion.

Cadrain said officers Karst and Short would play "good cop — bad cop" with him; one officer would berate and insult him while the other was comforting.

Dennis Cadrain, Albert's younger brother, said in an interview from his British Columbia home that it was very apparent to family members that the police questioning resulted in profound psychological scars.

"He has never hurt a person in his life," Dennis Cadrain said. "But he's

been hurt by a lot of people."

Dennis Cadrain said that weeks of intense questioning had left his brother psychologically unbalanced to the point where he was experiencing various visions and delusions. Despite this, police used his testimony at the preliminary hearing and trial, he said.

Almost immediately following the trial in 1970, Dennis Cadrain said his brother committed himself to the psychiatric ward of University Hospital in Saskatoon where he was heavily sedated and subjected to shock therapy.

In a statement given several weeks earlier to Henderson, Cadrain said he had a recurring vision of the Virgin Mary appearing from the clouds and stomping on a serpent that displayed Milgaard's head.

Federal Justice Department investigator Eugene Williams interviewed Cadrain last week in Port Coquitlam, B.C., but Dennis Cadrain said Williams was unimpressed with Cadrain's statements.

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Williams followed up with interviews of Albert's siblings, (Celine, Kenneth and Dennis), police officers and Caldwell to determine Albert's intellectual and emotional state during the investigation and trial. The substance of Albert's trial testimony had not changed and Williams concluded that there was no merit to the allegation that the police tortured Cadrain and coerced incriminating evidence from him. He had voluntarily gone to the police station. Although Albert had suffered mental illness problems later in life, Williams saw no evidence that mental illness affected the credibility of his trial evidence.

(d) Interview of Ron Wilson

After his initial interviews of Dennis and Albert Cadrain, Henderson travelled to Nakusp, British Columbia, arriving at Wilson's home unannounced on the morning of June 4, 1990, with the objective of obtaining a recantation. The last contact the Milgaards had had with Wilson was nine years earlier when Joyce Milgaard interviewed him by telephone.

Wilson and Henderson went to a restaurant to discuss the case. After some time, Wilson told Henderson that he had lied at trial and was prepared to provide a statement recanting his evidence. Henderson wrote out a six page statement and a one page supplement which Wilson signed. The interview and statement drafting took six to eight hours.

At some point in the interview, Henderson turned on his tape recorder. The tape has never been produced, despite numerous requests by the authorities and this Commission. Henderson told the Commission he has not been able to locate it.

As he did with Dennis and Albert Cadrain, Henderson told Wilson that Fisher had killed Miller and that he either confessed or would be confessing imminently. Henderson acknowledged that this was "stretching it".¹⁸⁴ Henderson told Wilson that once Fisher became identified as the killer, it would put all those who testified against Milgaard "in a very bad light, it would expose them as liars who committed perjury and sent an innocent man to prison".¹⁸⁵ He should be truthful and avoid embarrassment.

At the time, Henderson had very little knowledge of Wilson's interaction with the police and the evolution of his evidence. He was not aware that some of Wilson's incriminating trial evidence was corroborated by Milgaard in his 1969 discussions with Tallis. In particular, Henderson was not aware that Milgaard acknowledged that he had a knife on his possession on the trip to Saskatoon; that they stopped a woman for directions; that he thought about rolling her and stealing her purse; that their vehicle got stuck shortly after meeting the woman; that he left the vehicle for a short time, and that when they left Saskatoon, he grabbed a compact from John and threw it out the window of Wilson's vehicle.

Henderson also was not aware that Wilson's initial March 3, 1969 statement to the police did not contain a full story of what happened on the morning of January 31, 1969. Over the course of Wilson's subsequent interrogation by the police, Wilson provided additional truthful inculpatory evidence against Milgaard (stopping the woman for directions, vehicle getting stuck, David Milgaard leaving the vehicle alone and the compact incident).

Henderson told the Commission that even before he met Wilson, he believed that Wilson had been "manipulated, coerced and threatened"¹⁸⁶ by the police and that "the allegations that Ron Wilson levelled against David Milgaard at trial did not originate for him or from him, that they were – that they were

184	T28915.
185	T28914.
186	T22749.

Chapter 3 Overview of Facts

either planted in his mind or they were the result of pressure that was put on him by police to implicate Mr. Milgaard".¹⁸⁷

Henderson acknowledged that he had done no investigation whatsoever with respect to his belief and that he had no proof that the police had committed any wrongful conduct in their interview of Wilson. He said it was his "gut feel"¹⁸⁸ based on his experience in U.S. cases. He acknowledged that he introduced his theory of police manipulation, coercion and pressure to Wilson in his June 4, 1990 discussion. He said "I would have introduced that. I would have led him – I would have told him that I believe that there was a reason for him to have come up with this inculpatory, this evidence, false evidence and that I would have told him that I, it would not surprise me a bit if he was manipulated by the police into making false accusations".¹⁸⁹

Henderson failed to consider that some of Wilson's incriminating evidence may have been true. He also failed to consider that there may have been reasons other than police misconduct that may have caused or influenced Wilson to lie to the police and at trial.

187	T22739.
188	T29213.
189	T22749.

(e) The Ron Wilson "Recantation"

The Wilson recantation, as it came to be known, became one of the pillars of Milgaard's mercy application and received significant media attention. Those in authority who considered the recantation, then and later, all dismissed the statement as lacking in credibility.

Statement of Ronald Dale WILSON

I, Ronald Dale Wilson, declare as follows:

I live in Nakup, B.C. and am employed at Kal Tire, Ltd. as a salesman and service person.

Twenty years ago, I was a witness for the Crown in the murder trial of David Edgar Milgaard in Saskatoon, Sask. Subsequent to my testimony, Milgaard was convicted by a jury in the stabbing death of Gail Miller. I am providing this statement to Milgaard's investigator, Paul Huxderson, because I believe that he is innocent and because I believe that my testimony was coerced by police.

At the time of this murder in January 1969, I had driven from Regina to Saskatoon with Milgaard and Nicol Johnd, both friends of mine for the purpose of picking up Milgaard's friend, Shorty Cadman, and then heading from there to Edmonton or Calgary. Following this trip with Milgaard, Johnd and Cadman, we all returned to Regina, where I was arrested for fraud, as I recall, and sentenced to a jail term.

I was serving the remainder of this jail sentence at a work camp outside Regina when two police detectives, one from Regina and the other from Saskatoon, started questioning me.

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telling me about the Gail Miller case. I recall then telling me that I was a suspect in the murder because they knew that I and the others had arrived in Saskatoon on the morning of the murder and had left town the same day.

I distinctly remember telling the detectives during this initial questioning that I knew nothing about the murder and hadn't even heard about it. They told me that they thought I was lying. But it was true.

During this period of time I was being held in the Regina Correctional Centre. I was 17 years old and very frightened because I felt that the police were trying to pin the murder on me. I don't recall how long police questioned me in Regina but believe I was kept in jail there for the remainder of my term.

Sometime later, maybe two weeks after police started questioning me, I ended up somehow being questioned by police in Saskatoon. I don't recall being escorted there by police but know that I wouldn't have gone there on my own. I was hooked up to a polygraph and they started asking me the same questions again. Had I killed Gail Miller? Did I think David Milgaard had killed her? They asked me the same questions over and over.

over. I kept answering no, I didn't kill Gail Miller and didn't think David Milgaard had. I recall that I was questioned on the polygraph twice for maybe as long as six hours. It was like a sweat session. My mind was exhausted and I was mentally screaming. I remember it now being like brainwashing. Finally I began to implicate Milgaard in the murder, telling police the things they wanted to hear.

I am now certain that I was manipulated by police into lying and later giving false testimony against Milgaard.

I also recall that sometime prior the point where I started to implicate Milgaard police were using testimony allegedly made to them by Shorty Cadranis to convince me that David had killed Gail Miller.

One of the allegations I recall, was that Cadranis had seen blood on Milgaard's pants on that morning at his house. In court, I testified as to having seen the blood on Milgaard myself. ^(Cadranis) I have no recollections of seeing the blood on his pants. I believe that the police somehow convinced me that I had to have seen the blood because Cadranis had.

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From reading the transcript of my 1970 trial testimony, a copy of which was provided to me by Paul Henderson on this date, I can attest to having made the following additional allegations against Milgaard in the trial:

— that I saw Milgaard with a narrow-handled paring knife prior to our arrival in Saskatoon from Regina on the morning of the Gail Miller stabbing death.

* HE HAD
GIVEN A
BONE HANDLED
HUNTING KNIFE
WIT UP THE
ELEVATOR HE
DROVE INTO

This was not the truth. I saw the knife prior to our arrival in Saskatoon. I recall that David purchased a paring knife to cut our meat and cheese on the trip. But it was when we stopped for groceries in Regina — after we had left Saskatoon.

I recall that detectives showed me several knives, including one with a narrow-handle, and that they pressured me to tell them that the knife with the narrow handle was the one I saw and that I had seen David Milgaard with this knife before we got to Saskatoon.

— that Nicol John was hysterical when I returned to the car after we'd gotten the stick in the snow and I'd gone for help.

I have no recollection of her being hysterical at that time. The

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allegation that Nicol became hysterical after witnessing a murder take place makes no sense to me. If Nicol had seen Milgaard kill someone she would never have continued with us on the trip.

— that someone found a woman's compact in the glove compartment of the car after we left Saskatoon.

I have no independent recollection today of this having occurred.

— that when we were a time together in Calgary, Milgaard told me he'd "hit a girl" or "got a girl" in Saskatoon and put her purse in a trash can.

This testimony was planted in my mind by police. At no time did Milgaard confess anything like this to me.

By the time Milgaard went to trial, police had me convinced, in one sense, that he was guilty. Deep down I wasn't sure, however, and felt badly that I may have been manipulated into testifying against an innocent person and putting him away.

At the time, I was heavily involved in drugs, including heroin, speed, marijuana and LSD. I consider myself not to have been mentally stable at that period of my life.

(5)

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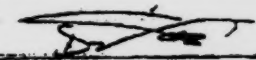
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I have thought about David Milgaard many times; he's been in my thoughts off and on for the past 20 years. I know how he has suffered in prison - where it must be like time is standing still. David Milgaard was my friend.

I was manipulated into lying against him - manipulated into believing my own lies.

I have been haunted through all of these years by my role in helping convict David. Although he has suffered the most, I feel that I was also a victim of this case.

I have provided this statement to Paul Henderson of Corrections Min. 15 times over the years and in the interest of justice for David Milgaard, whom I believe to be innocent.

DATED June 4, 1990 
Nakusp, B.C. Ronald Dale Wilson

⑥

017101

The following is a summary of the trial evidence that Wilson purported to recant in his statement:

1. At trial, Wilson testified that he saw blood on Milgaard's pants at Cadrain's house. In his statement, Wilson said he has "no recollection of seeing the blood on his pants". "I believe that the police somehow convinced me that I had to have seen the blood because Cadrain had".
2. At trial, Wilson testified that he saw Milgaard with a maroon handled paring knife prior to their arrival in Saskatoon. In his statement, Wilson said this was not the truth and that he saw no knife prior to their arrival in Saskatoon. Wilson claimed that the detectives showed him several knives including one with a maroon handle and "they pressured me to tell them that the knife with the maroon handle was the one I saw".
3. At trial, Wilson testified that John was hysterical when Wilson returned to the car after leaving to look for help when the vehicle got stuck. Wilson said that he now has "no recollection of her being hysterical at the time" and rationalizes this statement saying it "makes no sense" that "if Nichol had seen Milgaard kill someone she would have never continued with us on the trip".
4. At trial, Wilson testified that, after leaving Saskatoon John found a woman's compact in the glove compartment of Wilson's car and that Milgaard grabbed it and threw it out of the window. In his statement, Wilson said that he has "no independent recollection today of this having occurred".
5. At trial, Wilson testified that the day after Miller's murder, while in Calgary, Milgaard told him that he had "hit a girl" or "got a girl"¹⁹⁰ in Saskatoon and put her purse in a trash can. In his statement, Wilson said that "this testimony was planted in my mind by police" and that Milgaard did not say this to him.
6. At trial, Wilson testified that their vehicle became stuck near the intersection of 20th Street and Avenue N. The funeral home is located on that corner. In re-examination by Caldwell, Wilson was shown a sketch of the intersection identifying the funeral home on the corner and Wilson testified that they became stuck right beside the funeral home and he made a mark on the sketch to identify it. Caldwell asked him:

Q Can I show you then P-1 and there has been evidence that P-1 is a sketch of the T-shaped alley and that the thing showed here as '1402' is a...or the funeral home. Now does P-1 assist you - or is the intersection that you remember included in this sketch?¹⁹¹

Wilson answered that it was and he marked the location adjacent to the funeral home as where they were stuck that morning.

In his one page supplemental to the June 4, 1990 statement, Wilson says he read Nichol John's trial transcript and "learned for the first time that Nichol claimed that our car became stuck in an alley behind the funeral home on the morning in January 1969". He acknowledged that the car got stuck and said "But I saw no funeral home in the location where we became stuck. I recall that we became stuck at an intersection at the end of a block. I do not recall seeing a funeral home and would have so testified if I had been asked that question during the trial".¹⁹²

190	Docid 005172.
191	Docid 005172.
192	Docid 017096.

Chapter 3 Overview of Facts

In his statement, Wilson makes a number of comments regarding his interaction with the police and the effect on his trial testimony:

1. He said that he believes that Milgaard is innocent and that his testimony was "coerced by police".
2. At the time he was 17 years old and "very frightened because I felt the police were trying to pin the murder on me".
3. Wilson described the polygraph session with Roberts as being questioned for "maybe as long as 6 hours. It was like a sweat session. My mind was exhausted and I was mentally scrambled. I remember it now being like brainwashing." He "finally" began to implicate Milgaard in the murder, telling police the things they wanted to hear.
4. "I am now certain that I was manipulated by police into lying and later giving false testimony against Milgaard."
5. "I may have been manipulated into testifying against an innocent person".
6. "I was manipulated into lying against him - manipulated into believing my own lies".
7. Wilson also stated that at the time he was heavily involved in drugs and he considered himself not to have been mentally stable at that time.¹⁹³

Henderson told the Commission that he wrote out Wilson's statement and the choice of words were for the most part his although the entire statement was "approved"¹⁹⁴ by Wilson. Henderson said:

when you are writing a statement out for somebody like Ron Wilson you have to often help them describe their own feelings, help them come up with the words, umm, that's the way - - that's the way I've always operated when taking handwritten statements from witnesses.¹⁹⁵

Where Wilson said that his testimony was "coerced by police", Henderson said "coerce"¹⁹⁶ was not Wilson's word but Henderson's, and he would have explained the meaning to Wilson.

The word "manipulation" is mentioned four times in the statement in relation to police conduct. Henderson said this was not Wilson's word, adding that "I don't think it would have been a word that he would have chosen to come up with necessarily".¹⁹⁷

The word "brainwashing" was also a word that Henderson didn't think Wilson came up with on his own.

With respect to Wilson's statement that he was manipulated into lying against Milgaard and "manipulated into believing my own lies",¹⁹⁸ Henderson said that the thought was Wilson's but that the words and the way in which they appear were constructed by Henderson.

With respect to Wilson's statement that he had no "independent recollection"¹⁹⁹ of the compact incident, Henderson said the word independent meant that Wilson had no recollection independent of what the police officers told him. Henderson said the wording conveyed the possibility that the compact incident was planted in his mind by the police.

193	See Docid 017096.
194	T22764.
195	T22764.
196	T22757.
197	T22767.
198	Docid 017096.
199	Docid 017096.

Henderson provided the statement to Joyce Milgaard, Asper and Lett. Lett interviewed Wilson and on June 7, 1990, Lett published a front page story in the Winnipeg Free Press;

Milgaard witness says police forced him to lie

By Dan Lett

One of the chief Crown witnesses in the trial of convicted killer David Milgaard says threats and manipulation by Saskatoon police led him to lie in court in 1969.

In an interview from his home in British Columbia, Ron Wilson said he has lived in torment for lying and has come forward to tell the truth about an intensive police investigation into the brutal slaying of Saskatoon nursing assistant Gail Miller.

"None of it happened the way they (the police) said it happened," Wil-

son said. "I want to go straight."

"I was manipulated. It was like you're a puppet. Then you're scared that if you don't do what they wanted you do to, they would put you away. They told me that they would find some way to turn the tables on me."

Wilson said he is concerned people may not believe him now because he lied before, but he wants to set the record straight because he believes Milgaard was wrongly convicted.

"I have no more doubts," he said. "What I say now is the truth

and what I said then was fabricated."

"If people don't understand, well, I'll have to live with it. I hope they understand."

Wilson, Milgaard and another friend, Nichol John, were passengers in a car that arrived in Saskatoon on the morning of Jan. 31, 1969. They were looking for the house of another friend, Albert Cadran.

That same morning, police discovered Miller's half-naked body. Evidence showed she had been repeatedly stabbed and raped.

See WITNESS page 4



David Milgaard, shown in file photo, insists he's innocent.

Witness lied 'out of fear'

Continued from page 1

Milgaard, who has repeatedly claimed his innocence, was convicted of the crime one year to the date of the murder. The federal Justice Department is currently reviewing his case to see if new evidence supports having it reopened.

So far, Milgaard's application has been based on new interpretations of physical evidence from the trial that indicates he may not be linked to the crime.

Wilson's revelation is one of the first pieces of truly new evidence to surface.

Evidence used to convict Milgaard was circumstantial, but the testimony of Wilson, Cadran and John was instrumental in the conviction.

However, John, who originally told police that she had seen Milgaard kill Miller, recanted on the stand and was declared a hostile witness. Sources close to the investigation say John suffered a nervous breakdown following the trial and has lived in isolation in British Columbia ever since.

In this recent interview, Wilson said that after leaving Saskatoon the same day as the murder, he, Milgaard, John and Cadran drove west, stopping in Edmonton, Calgary and Banff, before returning to Regina.

He said he did not hear of the murder until March 1969, when Saskatoon police called him in for questioning about it. He was in jail in Regina at the time on a fraud conviction.

He said he denied knowing anything about the killing.

Two months later in May 1969, he said, police summoned him to Saskatoon for two days of questioning.

Wilson said he began by denying any knowledge of the crime, but after hours of intense questioning by police and polygraph operators, he broke down.

"They asked me questions about everything — if I thought David had done it, if I had done it, about these knives that they showed me, if I had ever seen them before. I was on a polygraph for over six hours."

Eventually, Wilson said, if he wouldn't agree with the police interrogators, they claimed the poly-

graph machine indicated he was lying. Finally, he said, sheer fright forced him to agree with anything the police said.

In his testimony, Wilson provided the trial with several important pieces of evidence:

• He said he had seen Milgaard holding a maroon-handled paring knife in the car before they arrived in Saskatoon.

But Wilson now says he repeatedly argued with police that he had not seen any knife in the car. But, he said, police refused to believe him and eventually showed him five knives and demanded that he identify one.

He said police forced him to identify the maroon-handled paring knife

thought to be the murder weapon.

Wilson also testified that the car, which he was driving, became stuck on a street near a funeral home, metres away from where Miller's body was eventually found.

Wilson now says that he continually told police the car became stuck at the "T" intersection of two streets, and not in an alley as John had testified.

Wilson testified that once they reached Cadran's house, he saw blood on Milgaard's clothes.

Wilson now says he said nothing he never saw blood and informed them that his mother had washed Milgaard's clothes when they returned to Regina and she did not see blood.

*June 7, 1990
Winnipeg*

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A second article was published by Lett on the same day.

Winnipeg Free Press, Thursday, June 7, 1990

Sloppy probe costs inmate '18 months'

The federal Justice Department has conducted a sloppy and incomplete investigation of David Milgaard's claim of innocence, perhaps wasting another two years of the life of Canada's longest-serving prisoner, an MP and Milgaard's lawyer have charged.

Winnipeg lawyer David Asper said he was shocked to learn federal investigators have not bothered to contact any of the original witnesses in the case, especially since one has already recanted his original testimony.

"How do you explain where 18 months went?" Asper said. "We are insisting that the minister react immediately to this latest evidence. I can only hope they don't use this as an excuse to prolong the whole thing."

"A man is still in jail, I hope they care about that."

Milgaard was refused parole yesterday during a hearing of the National Parole Board at Stony Mountain Institution. Asper said the board would not act on the new evidence provided by him.

He said he is concerned no one in the federal government is acting, even after learning that a key witness said he lied at the trial.

This is just the latest in a series of remarkable disclosures that have been piling up in Milgaard's inmate's file, currently with federal justice investigators.

On Tuesday, Manitoba's chief medical examiner, Dr. Peter Markesteyn, released a report that indicated forensic evidence from the trial thought to be semen samples might, in fact, be dog urine.

All of this comes on the heels of the disclosure by Winnipeg Liberal MP John Harvard that the RCMP, acting on information provided by Milgaard's mother, are investigating a second suspect they believe may have been responsible for the crime.

Asper said despite the growing pile of evidence that indicates his client may be innocent, he has been asked repeatedly by Justice Department officials to remain patient during the investigation process.

"They kept asking me to trust them, but I feel as if the fox has been babysitting the chickens," he said.

Harvard (Winnipeg St. James), who continued grilling Justice Minister Kim Campbell in the Commons yesterday, said he too was shocked at the shortcomings of the Justice Department probe.

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(f) Investigation of the Wilson Statement by Eugene Williams

Williams started with the premise that Wilson's trial evidence was under oath, tested by cross-examination and that some credence had to be given to the sworn and tested evidence. He also believed that Wilson's incriminating statements were verified by polygraph. This had been the widely held belief at the time. However, in 1992 when Roberts was testifying at the Supreme Court Reference, he said that the polygraph was used to test Wilson's initial exculpatory answers. When Wilson changed his evidence and provided inculpatory evidence, Roberts turned him over to the police to provide a statement. Roberts did not verify Wilson's inculpatory statements by polygraph.

Williams told the Inquiry that his task was to provide the Minister with sufficient context for the recantation so that she could assess how much weight to put on it. He needed to look into the circumstances behind the statement, to ensure that it was a genuine recantation. Williams tested it in two ways. Firstly, he looked at the facts now disputed and whether there was any other evidence that objectively confirmed the accuracy of the recanted facts. In this case, it meant looking at whether John, Cadrain and Milgaard corroborated the "recanted facts".²⁰²

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The second task was to "test the reasons advanced by the recantor".²⁰³ If the reasons advanced were not credible and truthful, Williams said the recantation itself would lack credibility.

Williams had a number of concerns regarding the credibility of Wilson's statement. He was concerned about the substantive content, the language used, the manner in which the statement was obtained, and the fact that it was provided to the media before being received by Williams. Williams told the Commission:

1. He was surprised that the Wilson statement was elevated as a new ground in the application because he had recently asked the Milgaard counsel whether there was anything else to add to the application and nothing was provided.
2. He wanted to determine why Wilson would suddenly recant 20 years after the murder and 18 months after Milgaard filed his application. He assumed that Wolch or Asper had interviewed Wilson prior to submitting the application and he wanted to find out what prompted Wilson to recant now rather than before.
3. Based on what he read in the paper, he understood that Henderson interviewed Wilson for an entire day yet only a six page statement was created. Williams expected that to obtain a recantation the interviewer and witness would have to cultivate a trusting relationship. Williams was surprised that Henderson obtained the statement in one day, having never met Wilson before.
4. The fact that Wilson's statement was delivered to Lett and the media before being sent to federal Justice officials, and that a story was published to put federal Justice officials on the defensive troubled Williams. He described it as "another chapter in the...politicization of the s. 690 process"²⁰⁴ and said he was "blindsided"²⁰⁵. Releasing information to the media before providing it to federal Justice officials caused Williams to doubt the credibility of the information. He believed the statement may have been geared more towards getting media attention than providing a credible basis for the application.
5. He had already read the transcript of Milgaard's trial and he was surprised that the Milgaards would now be alleging police coercion, manipulation and misconduct. It had not been previously raised and based on Williams' reading of the trial transcript, he did not see any evidence of police mistreatment of the witnesses. Wilson had frequent contacts with the police and a criminal record before he was questioned in the Miller investigation, and he did not appear to Williams to be the type to be intimidated. He had reviewed Tallis' cross-examination of Wilson regarding his interaction with the police and concluded that Wilson gave no hint of police coercion or influence.
6. If Wilson had been coerced by the police to provide a false statement, Williams wondered what caused Wilson to give false evidence at the preliminary hearing and trial, which were much later. The fact that Wilson volunteered Melnyk and Lapchuk's motel room evidence to the police also caused Williams to doubt the allegation of police coercion.
7. The language used in the statement was suspicious. Williams recognized that Wilson did not write it and that someone with a good command of the English language had. Williams believed the statement was drafted for media appeal by using words such as "brainwashing and sweat session", which Williams said was "stuff you see in some movies".²⁰⁶

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Williams concluded that he needed to interview Wilson and the police officers who dealt with him, and to review the record of his interactions with police in 1969 and 1970.

Williams had difficulty arranging an interview. The Milgaard group did not want Williams to talk to Wilson until he had his own lawyer, so Milgaard counsel made arrangements to retain Ken Watson to represent him. The concern stemmed from alleged improprieties in Williams' interviews of Hall and Linda Fisher.

Wilson agreed to be interviewed by Williams on June 18, 1990. Williams, Sgt. Gary Tidsbury of the RCMP and a court reporter arrived at the Nakusp detachment for the interview. Wilson did not appear so the RCMP went to his home. Wilson called his lawyer, Watson, and told the officer that they would be at the detachment at 2:30.

Instead, Watson arrived at the detachment without Wilson to say that his client did not wish to be interviewed. He had concerns about the nature of Williams' questioning after speaking to Asper who told him that other witnesses had been "intimidated, belittled and not believed".²⁰⁷ Williams invited Watson to remain during the questioning to protect his client's interest. Watson talked to Wilson and returned a half-hour later to say that his client would only testify in a court room setting. Watson later told Williams' superior, William Corbett, that Wilson was not interested in providing evidence of perjury under oath, and that Wilson was in a highly emotional state and did not want to be put through any more interviews, but would tell his story to a judge.

In a letter dated June 19, 1990, Watson advised that Wilson would make no statements to Williams and that any further evidence would have to be before a court:

I would confirm my advice to you that my client was aware from Mr. Asper that some other witnesses interviewed by your department were dissatisfied with their treatment. I understand from you and Mr. Asper that Mr. Asper has written to your department expressing his position with respect to that treatment.²⁰⁸

Williams was suspicious of the recanted statement; the manner in which it was taken, the fact that Wilson was not prepared to be interviewed, and that Milgaard's counsel had appeared to play a role in the refusal. In Williams' memorandum to file on June 19, 1990, he concluded:

In these circumstances, little if any weight can be given to the unsworn allegations contained in this recent statement. It also appears that the applicant has actively intervened to discourage or prevent any attempt to question this witness to determine the accuracy of the statement.²⁰⁹

In the days that followed, Corbett communicated with Wilson's counsel to arrange another interview, and terms were discussed. On June 22, 1990, Wolch contacted Corbett and advised that Wilson was prepared to be interviewed on June 28, 1990, provided Wolch was allowed to attend (but not question) in addition to Wilson's lawyer and on condition that Williams not be the counsel interviewing Wilson. Wilson's lawyer repeated these conditions a few days later.

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208	Docid 003558.
209	Docid 003561.

Federal Justice officials would not agree to have Wolch present, although they agreed to provide him with the transcript. They would not assign someone other than Williams to conduct the interview. Wilson ultimately agreed to these terms, and an interview was scheduled for July 20, 1990.

(g) The July 17, 1990 Dan Lett Article

In preparation for the interview, Williams sent Watson a copy of Wilson's preliminary and trial evidence and his statements to police including that to Riddell of the RCMP on March 3, 1969.

On July 17, 1990, Lett published the following article in the Winnipeg Free Press:

WINNIPEG F-P JULY 17 1990

Witness statement withheld, lawyers say

By Dan Lett *File Press July 17/90*

A statement given by a star witness in the David Milgaard case that could have discredited his entire testimony appears to have been withheld from defence counsel during the 1969 trial, two lawyers close to the case have charged.

A statement given by Ron Wilson to RCMP in Regina on March 3, 1969, denies any knowledge of the brutal

murder of nursing assistant Gail Miller in Saskatoon or any involvement Milgaard may have had with the crime.

Milgaard, who was convicted of the crime and sentenced to life in prison, has maintained his innocence since. The federal Justice Department is reviewing his case to see if it warrants a new trial.

Wilson's first statement stands in stark contrast with another dated

May 23, 1969, in which he gave Saskatoon police officers several important pieces of testimony.

Wilson told police he saw Milgaard with a paring knife before they arrived in Saskatoon, a knife similar to the one later identified as the murder weapon. Wilson also testified he saw blood on Milgaard's clothes and later heard him boast that he had "hit" or killed a woman. See REVELATION page 4

Revelation shocks lawyer

continued from page 1
in Saskatoon.

However, in a statement taken last month by a Seattle private detective, Wilson claimed he was pressured by police into testifying against his friend.

Wilson said he told the police he knew nothing, but they threatened to pin the murder on him unless he testified against Milgaard.

In the period between the first and second statements, Wilson said he was subjected to intense questioning and polygraph tests.

The revelation of the first statement has created serious concerns about whether Cal Tallis, Milgaard's lawyer in 1969 and now a Saskatchewan Court of Appeal justice, was ever told of its existence.

Tallis will not discuss the case. David Asper, Milgaard's Winnipeg lawyer, noted Tallis made no reference to the first statement in questioning Wilson at either the preliminary hearing or trial.

Asper said it is inconceivable that Tallis, if he had known of the original statement, would have ignored it at the trial.

"It is painfully obvious from the transcripts that Tallis did not direct Wilson to the original statement," Asper said. "It strikes me that it would be serious misconduct for the Crown not to provide that information to the defence."

"It suggests to me that Tallis may never have known about it."

Ken Watson, a B.C. lawyer representing Wilson, said he was shocked when he opened a package from the Justice Department containing, among other things, the two conflicting statements.

'Exposed in court'

Watson said not only does the first statement lend credibility to his client's recent recant of his testimony, it suggests a serious omission in information given to Tallis.

"I can see no reason (for the statement to be withheld)," Watson said. "Any lawyer would have questioned it and it would have been quickly exposed in a court."

The original four-page statement, witnessed by RCMP Insp. J. A. B. Riddell, describes an unsuccessful trip to Saskatoon the morning of Jan. 31, 1969.

In the statement, Wilson noted he never saw Milgaard with a knife, as he later testified, nor did he see blood on his clothes, another damning disclosure at the trial.

In addition, Wilson rebuts a major Crown argument by saying Milgaard did not leave the car for a period of 15 minutes when they became stuck. Crown attorney T. D. R. Caldwell argued Milgaard killed Miller in the time he was away from the car.

"I am convinced that Dave Milgaard never left our company during the morning we were in Saskatoon," Wilson's original statement said.

Wilson, in an interview from his B.C. home, said he did not remember giving the first statement, but firmly believes Tallis could have broken him on the stand if he had used it at the trial.

"It's all a bunch of crap," Wilson said of his testimony. "The first one was the one that was supposed to be in court. If they had used it then, it would all have been over."

Wilson said he is now more confident than ever that similar statements must exist for the other witnesses — Nichol Johs and Albert Cadman — that would also highlight major discrepancies.

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Wilson's March 3, 1969 statement to Riddell of the RCMP was provided by Caldwell to Tallis on August 15, 1969, prior to commencement of the preliminary hearing. At the preliminary hearing and trial, Tallis specifically questioned Wilson about his interview with Riddell and the March 3, 1969 statement. For sound tactical reasons, Tallis did not show the statement to Wilson, nor did he seek to introduce the document as evidence, fearing that the Crown would ask to have Wilson's later more incriminating statements made exhibits as well.

Tallis said he had to be careful how he used the March 3 statement, fearing that Wilson might say he withheld information in his initial statement because he was trying to help his friend. However, Tallis was still able to question Wilson without introducing the March 3 statement as an exhibit. The following are excerpts from the preliminary hearing and trial:

Tallis' cross-examination of Wilson (preliminary hearing):

- Q. Now then, later on, I believe that an inspector from the Regina city police came to see you there at the jail on March 3rd? An inspector of the mounted police perhaps?
- A. Mounted police?
- Q. Pardon? Well, let's get it this way. About on March the 3rd, a policeman came to see you at the jail, is that correct?
- ...
- Q. I'm referring to a specific occasion when a Mr. Riddell came to see you.
- A. Riddell, that's the name.
- Q. On an occasion when Mr. Riddell came to see you, you did give a statement in writing?
- A. Yes, I did.²¹¹

Caldwell's examination of Cadrain (preliminary hearing):

I might mention I have supplied my learned friend with the two statements made by this witness, two made by Wilson, two or three as the case may be, the one has two pages added the day after it started and two made by Ms. John ahead of the witnesses being called...²¹²

Tallis' cross-examination of Wilson at trial:

- Q. And at the time Mr. Ruddell (sic) was there – Inspector Ruddell was there, there was no suggestion to you that you were a suspect in connection with this Gail Miller murder?
- A. I don't believe so. There might have been – I'm not sure if it was that time I gave the statement to him or...
- Q. ...Pardon?
- A. I'm not sure if it was that time I gave the statement to him or he came again. I'm not sure.
- Q. Well, in any event before you said anything to Inspector Ruddell about it there was no suggestion that you were a suspect?
- A. No.

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- ...
- Q. And I suppose that it's fair to say that when you were talking to Inspector Ruddell (sic) on this occasion you told him that nobody in your car had anything to do with this terrible thing that happened in Saskatoon?
- A. That's right.
- Q. And in particular you said that you hadn't had anything to do with it?
- A. Yes.
- Q. And that David hadn't had anything to do with it?
- A. Yes.

...²¹³

A copy of Wilson's March 3, 1969 statement was on Tallis' file and a copy obtained by Joyce Milgaard when she reviewed the file in 1981. She had the March 3, 1969 statement and specifically referred to it when she interviewed Wilson in 1981. She passed along a copy of this statement to Wolch and Asper in 1986.

After reading Lett's article, Joyce Milgaard had concerns that some of the statements in it were wrong. Based on her reading of the transcript, she believed Tallis had Wilson's statement. In a telephone conversation that she recorded and provided to the Commission, she told both Asper and Lett that she believed that Tallis had Wilson's statement and referred to the transcript of Tallis' cross-examination of Wilson at trial where he questioned Wilson about the first statement he gave to Riddell. She reviewed certain portions of the transcript with Asper on the telephone and identified where Tallis referred to Riddell and the statement. Asper replied that mentioning the statement did not necessarily mean that Caldwell gave the statement to Tallis. He told her that Caldwell might simply have indicated that a statement existed. Asper commented that if Tallis did in fact have the statement, he would have put it to Wilson word for word and shown the statement to the jury. Asper said these were the "red flags"²¹⁴ that tell him that Tallis did not have the statement, although he may have had a general idea that one was given and in essence was a denial of any involvement.

Joyce Milgaard then telephoned Lett and had a similar discussion. Lett told her that he could not believe the statement would not have been entered into evidence if Tallis actually had it. She concluded, therefore, that Tallis must not have had the statement but was aware of its contents.

The article was not corrected. Despite the concerns Joyce expressed to Asper and Lett, she contacted a number of other media outlets and alerted them to the information in the Lett article.

The article reflected badly upon the Milgaard position as seen by federal authorities, police and Saskatchewan Justice. Investigation soon showed that the statement had been given to Tallis by Caldwell. The article suggested misconduct on the part of Caldwell for failing to disclose the statement, or alternatively, incompetence on the part of Tallis for not using the statement at trial. Both suggestions were wrong and were damaging to the reputations of Caldwell and Tallis, as well as to the administration of justice.

(h) Eugene Williams' Interview of Ron Wilson

Williams interviewed Wilson on July 20, 1990 in Nakusp, B.C.:

- Wilson said that he made an error on his June 4, 1990 statement by saying Milgaard did not have a knife on the trip to Saskatoon. In fact he had a bone handled hunting knife which he stole from the elevator before arriving in Saskatoon.
- Wilson admitted that he was exaggerating a bit when he said the polygraph sessions took six hours.
- Wilson acknowledged that he had implicated Milgaard in Regina two days before he underwent the polygraph session in Saskatoon and not "only after [he] had been brainwashed"²¹⁵ by Roberts, as he suggested in his statement.
- Wilson said the police did not offer him or promise him anything, and did not threaten him in the course of questioning.
- Wilson said at the time he testified at the preliminary hearing there was no police pressure, and at the time of trial they "had no hold on [him]".²¹⁶

After the examination, Williams asked Wilson to undergo a polygraph test. Discussions ensued with Wilson's counsel who insisted that the original polygraph records from 1969 be produced as a condition of any further testing. These had been destroyed many years earlier and could not be provided. Ultimately, they could not agree on terms and further testing was not done.

As well as interviewing Wilson about his June 4, 1990 statement, Williams reviewed the entire police file in Saskatoon to obtain a record of Wilson's dealings with the police. He also contacted Roberts about Wilson's allegations of manipulation by Roberts during the polygraph exam.

Roberts told Williams that he did not recall the details of his interview. However, he did recall that Wilson or John said something which prompted him to think they were in the alley when "Milgaard took the girl".²¹⁷ Roberts did not have any notes or the polygraph records, and further inquiries by Williams with the Calgary and Saskatoon Police determined that the records had not been retained.

Williams interviewed Karst and Short and noted that their recollection of the events did not extend beyond the investigation reports prepared at the time. They denied the allegations that they coerced, manipulated or planted stories with Wilson.

(i) Conclusion of Eugene Williams

Williams concluded that little weight should attach to Wilson's recantation. In the case of the compact, Wilson was recanting a fact which had been corroborated by Milgaard to his lawyer and by Cadrain and John's trial testimony. As Williams told the Inquiry, Wilson "may have recanted too much".²¹⁸

Williams doubted Wilson's reasons for lying at trial. When questioned, Wilson could not provide any specifics of coercion, manipulation or "the planting"²¹⁹ of stories by the police. Instead, he said only that during the polygraph session Roberts repeated questions. He could point to no improper conduct by any

215	Docid 001327.
216	Docid 001327.
217	Docid 002108.
218	T34819.
219	T34830.

police officer who questioned him. He said that he made up the lies, and that he was not told to lie by the police.

Williams was impressed by the fact that Wilson testified freely at the preliminary hearing and trial; that he volunteered Melnyk and Lapchuk as potential witnesses to the police; and that shortly after the trial he applied for the reward. In light of these facts, Wilson's contention that he was manipulated, coerced and pressured into falsely testifying at Milgaard's trial did not ring true.

The manner in which the statement was produced and presented in the media before being provided to federal Justice officials, and the use of sensational words in the statement to attract media attention, also lessened the credibility of the statement in Williams' eyes.

3. Markesteyn Report – Dog Urine Theory

(a) Introduction

In May 1990, Asper retained Dr. Peter Markesteyn, the chief Medical Examiner of the Department of Justice in Manitoba, to review the Ferris report. On June 4, 1990, Markesteyn issued a report, stating he agreed with Ferris that the frozen semen tendered as evidence at Milgaard's trial did not link Milgaard to the murder. However, unlike Ferris, he did not say that the frozen semen proved Milgaard was innocent.

Markesteyn went on to suggest that the frozen substance found at the murder scene could have been dog urine, due to its yellowish color. Markesteyn did not say it was dog urine, but rather that tests should have been done to exclude the possibility that the substance was non-human. The report was quickly and widely disseminated in the media, and was used by the Milgaards to suggest that the physical evidence linking Milgaard to the murder was dog urine.

The dog urine allegation was contrived and false. It had no factual basis as tests were properly conducted in 1969 confirming the substance was human semen. Paynter, a RCMP serologist, conducted tests on the frozen semen to confirm that it was human spermatozoa and not dog urine. Regrettably, Markesteyn was not provided with a complete investigation and trial record which would have clearly rebutted his speculation that it may have been dog urine.

Williams concluded the Markesteyn report did not support Milgaard's application in any respect. The frozen substance was not dog urine but rather human semen. Furthermore, the semen was not evidence which linked Milgaard to the murder in any event. Despite this, the dog urine theory was advanced by the Milgaard group in the media to ridicule the police officers who gathered and analyzed the semen, and the prosecutor who tendered it as evidence at trial. The dog urine theory negatively affected the credibility of Milgaard's application to the federal Minister.

(b) Engagement of Dr. Peter Markesteyn

Because they had not heard anything from federal Justice officials regarding the Ferris report, the Milgaards thought that a second report might provide further support to the application.

Markesteyn's engagement was reported in the media by Lett, and was raised by MP Harvard in the House of Commons. Williams became aware and contacted Markesteyn directly because he had

concerns that Markesteyn might base his report on incomplete information. Williams sent a copy of the trial judge's jury charge to Markesteyn, and followed up with Milgaard's counsel, requesting a copy of Markesteyn's report once it was completed.

In late May 1990, the media reported that Markesteyn's review had been completed. Williams contacted Markesteyn on May 29, 1990 and requested a copy of the completed report. Markesteyn expected the report to be completed by June 1, 1990 and told Williams he would send him a copy. Williams asked if his report would address the question "Whether the scientific evidence exonerated David Milgaard?"²²⁰ Williams thought that Ferris' answer to this question had been wrongly construed and reported as suggesting the scientific evidence at trial exonerated Milgaard. Markesteyn said he would address this question in his report.

On May 31, 1990, Markesteyn called Williams and advised that his report was completed but he was instructed to deliver the report to Asper, who would then distribute it. Williams asked Markesteyn whether, in his opinion, the forensic evidence exculpated David Milgaard. Markesteyn replied "I can't say the forensic evidence excludes him",²²¹ adding, however, that his written report did not address this question.

(c) The Markesteyn Report

Markesteyn's report dated June 4, 1990 was made public and provided to Williams on June 5, 1990. In it:

1. he agreed with Ferris that the serological evidence presented at trial failed to link Milgaard with the semen retrieved from the snow.
2. he challenged the assumption that Milgaard was a non-secretor stating that the test conducted in 1969 should not be relied upon as proof of his non-secretor status.
3. he raised concerns about the contamination of the semen found in the snow bank and he raised the possibility that certain organic substances could have caused the positive A antigen test, meaning that the semen might not have contained A antigens.
4. he concluded that: "If, to everyone's satisfaction, it was established that the origin of the yellowish patch was unadulterated, uncontaminated human semen, then the presence of the A-antigen in this specimen clearly, from a serological point of view, could not be Mr. Milgaard's."²²² This was premised on the assumption that Milgaard was a non-secretor.
5. he did not state that the frozen semen retrieved from the snow bank proved Milgaard's innocence or exonerated him.

Markesteyn reported that yellowish stains in snow banks most commonly "find their origin"²²³ not in human ejaculates but in urine, most commonly of canine origin. Markesteyn introduced the "dog urine theory" in his report:

The serology section determined it to be not only semen but of human origin. In order to reach a firm scientific conclusion whether the semen retrieved from the snow bank four days after the assault was indeed human one needs to review the methodology used by the serologist at that time and thus one needs to review the notes that were made at the time.

220	Docid 002510.
221	Docid 333433.
222	Docid 155517.
223	Docid 155517.

I have been informed that the original notes on which the evidence by Staff Sergeant Paynter was based are no longer available. Staff Sergeant Paynter informed me that he does not remember (some 20 years after the event) whether or not he performed specific tests to determine the human origin of these specimens.²²⁴

The reference to semen being retrieved from a "snowbank"²²⁵ is somewhat misleading. The semen, according to evidence we heard at the Inquiry, came from snow which had been dug from the spot where Gail Miller's body lay and piled to one side. Markesteyn would not have known this.

Markesteyn did not say that the frozen substance was dog urine but rather that a further review of the serologist's 1969 work was necessary to exclude the possibility it was dog urine.

Paynter had retained his original notes of the 1969 tests and he produced them at the Inquiry. They confirmed that he conducted appropriate tests in 1969 to establish that the frozen substance was human semen. Paynter told the Inquiry that he did not recall ever talking to Markesteyn nor did he recall a request being made for his notes.

Paynter said he had his notes in 1990 and that if he had been asked by Markesteyn or anyone else about his testing of the human origin of the frozen substance, he would have told him exactly what he did on the case, his conclusions, and the basis for those conclusions.

Markesteyn acknowledged that had he known about Paynter's 1969 tests and analysis he would not have even raised the possibility of the frozen substance being of canine origin.

Markesteyn was not provided with the March 27, 1969 lab report prepared by the head of the RCMP hair and fibre section, Corporal Victor Molchanko. In it Molchanko identified six human pubic hairs removed from the frozen semen delivered to the RCMP. Molchanko also testified at Milgaard's trial that human pubic hairs were found in the frozen semen.

Markesteyn told the Commission that if he had been provided with Molchanko's lab report and related trial evidence his theory as to the possibility of dog urine "would have been weakened".²²⁶

The speculation that the frozen semen might have been dog urine was clearly unfounded. Ironically, if the frozen substance was dog urine, this would have negated Ferris' contention that the frozen semen proved Milgaard's innocence. The premise of Ferris' opinion was that the substance found in the snow was the perpetrator's semen.

(d) Investigation by Eugene Williams

The Markesteyn report was provided to Williams by letter dated June 5, 1990. In the letter Asper states:

You will note that the report confirms the original report of Dr. James Ferris which was submitted with our application. However, it goes further to suggest that the samples used to link David Milgaard to the scene of the crime could well have been dog urine, which could have caused the results suggesting the presence of sperm and/or blood. Assuming that these samples were in fact semen, Dr. Markesteyn confirms that they could not have come from David Milgaard.

224	Docid 155517.
225	Docid 155517.
226	T33751.

With all due respect, this is the kind of action that we anticipated your office would take when we first submitted the application on behalf of David Milgaard. Surely by now you must accept that this is not a frivolous application. Rather it is one which demands immediate attention from your Department.²²⁷

Markesteyn told the Inquiry that Asper's letter summarizing his report was not quite accurate. Only if he assumed the frozen substance was uncontaminated A positive semen, and that Milgaard was a non-secretor, could Markesteyn say that it could not have come from Milgaard. Markesteyn could not say that it was A positive semen, nor could he say that Milgaard was a non-secretor as was assumed at trial. Markesteyn said he did not confirm Ferris' report to the extent that Ferris said the frozen semen exonerated Milgaard or proved his innocence.

Upon receipt of the Markesteyn report, Williams sent it to Alain for review. Alain advised him that the "morphological difference of human spermatozoa and canine spermatozoa are several. The experienced examiner would not have any problems in distinguishing between human and canine spermatozoa."²²⁸

On June 11, 1990, Williams met with Ferris to discuss his report and to obtain his comments on Markesteyn's findings. Ferris told Williams that he was in general agreement with the findings of Markesteyn and that he could not exclude the yellow frozen lumps which contained sperm as having originated from a dog.

Ferris said his opinion that the frozen semen exonerated Milgaard was premised on the assumption that the semen was not contaminated. If contamination was taken into account, Ferris said "you could not say it (the serological evidence) excluded [Milgaard]".²²⁹ Ferris also raised doubts regarding the non-secretor status attributed to Milgaard in 1969. He said the testing and the result might have been wrong.

In a memorandum summarizing his meeting with Ferris, Williams concluded:

Very little, if any weight can be given to a conclusion that blindly ignored the obvious contamination of the samples that were collected. The conclusion is also wrong because an essential fact upon which it is based, namely, David Milgaard's status as a non-secretor, has not been established.

The procedures used to collect the saliva sample tested to determine David Milgaard's secretor status resulted in destruction of the very matter that would signal his status as a secretor. The resulting finding that he was a non-secretor was ensured as a result of the failure to properly preserve the sample.²³⁰

Williams contacted Colin Merry who had worked with Markesteyn. Merry confirmed that the manner in which Milgaard's saliva test was done in 1969 would have destroyed the A antigen, so even if Milgaard was a secretor the test would have disclosed non-secretor status.

On June 12, 1990, Williams visited with Markesteyn and Merry in Winnipeg. Williams sought clarification of items in Markesteyn's report, and Markesteyn's reaction to the Milgaard position that his report confirmed Ferris' findings.

227	Docid 157075.
228	Docid 185365.
229	Docid 002483.
230	Docid 002483.

Williams showed Markesteyn a June 6, 1990 letter from Milgaard's counsel saying that Markesteyn's report "confirms the findings of James Ferris".²³¹ Markesteyn told Williams he "disagrees with the conclusion that Milgaard could not have done it because there was insufficient time"²³² and "disagrees with the conclusion that the serological evidence exonerates Milgaard".²³³ Markesteyn also pointed out that the conclusion pointing to Milgaard as a non-secretor had not been established.

Despite the fact that the three forensic experts consulted by the Milgaards questioned the reliability of Milgaard's 1969 secretor test, no steps were taken at the time to verify his status as a non-secretor. In February 1992, at the request of Saskatchewan Justice, and as part of the Supreme Court Reference proceeding, he was tested and found to be a secretor.

By mid-June 1990, Williams had reviewed the Markesteyn and Ferris reports and discussed them with Ferris, Markesteyn and Alain. He concluded that neither report established any credible evidence to support Milgaard's application.

(e) Dog Urine Theory in the Media

Although it had no basis in fact, the dog urine theory gained significant attention in the media, having been circulated by the Milgaard group to attract media attention to the cause.

In the days before Markesteyn's report was made public, Asper and Joyce Milgaard were interviewed on a television program. Asper indicated that the key people involved in 1969 and 1970 now held high positions including the investigator who was the Chief of Police in Saskatoon (Penkala). Asper said that this is the guy who found the samples in the snow "which if all goes well, by the time this show airs will be ridiculed".²³⁴

The suggestion that Milgaard may have been convicted by dog urine was described by Asper as "sensational"²³⁵ and had "great publicity value in terms of continuing to discredit the evidence at trial".²³⁶

The media reporting of the Markesteyn report evolved. Initially it was reported that it was only a possibility that the frozen substance was dog urine. It later became a likelihood, and finally some reporters said the frozen substance was dog urine.

In an article published June 6, 1990, Lett reported:

Dr. Peter Markesteyn who reviewed serological and other forensic evidence from Milgaard's trial, said in a report obtained by the Free Press that semen samples used by Crown prosecutors to link Milgaard to the crime were insufficiently analyzed and could just as easily be 'dog urine' as human semen.

...

I was not convinced myself that enough was done to make sure that it was indeed human semen. The top coroner said 'I am not saying it was dog urine; I am saying how do you know it isn't? No tests were done to exclude urine.

...

231	Docid 002507.
232	Docid 002507.
233	Docid 002507.
234	Docid 230098 and T33582.
235	T26807.
236	T26804.

Markesteyn said the technology was available in 1969 to conclusively analyze the two yellowish spots, but the tests were never performed.

Asper said after reading the Markesteyn report it seems entirely likely that his client was convicted partly on the basis of dog urine left in the snow after the murder.²³⁷

The semen samples were not used by the Crown to "link Milgaard to the crime".²³⁸ The semen was properly analyzed, and Paynter had done tests in 1969 to exclude dog urine and confirm that the substance was human semen. Milgaard was not convicted partly on the basis of dog urine left in the snow.

In a front page story in the Saskatoon StarPhoenix on June 6, 1990, Fuller reported that:

A key piece of evidence used to convict David Milgaard of murder was likely worthless, according to a new forensic review.

Alleged semen found in the snow at the scene four days after the murder, which was linked to Milgaard, could have been contaminated by dog urine.

...

David Asper, Milgaard's lawyer, is more blunt about the report.

"It concludes that what Penkala found in the snow could very well be dog urine, said Asper."²³⁹

In an article published the next day in the StarPhoenix, Fuller writes:

Like Ferris, Markesteyn says emphatically that semen found at the scene cannot have been Milgaard's.

Markesteyn told the Inquiry that this was not an accurate report of his findings.

In a related statement published the same day, Penkala commented that "the media has allowed itself to be used in promoting his [Milgaard's] cause".²⁴⁰

In a three page story published in the August 13, 1990 edition of the Western Report, there is a picture of Markesteyn with a caption that says "Dr. Markesteyn: The Crown's Sperm Samples Were Dog Urine".²⁴¹ The article states:

Dr. Markesteyn, 59, is the chief medical examiner of Manitoba. He has concluded that the crown sample was not semen at all, but dog urine.²⁴²

In 1990, Asper appeared on "Current Affair", a national U.S. television program and stated "what they tendered as Milgaard's semen was, in fact, fido's urine".²⁴³

237	Docid 159853.
238	Docid 159853.
239	Docid 048870.
240	Docid 217483.
241	Docid 026530.
242	Docid 026530.
243	T33691.

In an August 11, 1991 front page story in the *Toronto Star*, Edwards wrote a lengthy article on Milgaard's case. One of the headings in the article read: "Semen presented at Milgaard's Trial was really dog urine".²⁴⁴ The article stated:

What was presented in court as possibly Milgaard's semen near the crime scene was actually dog urine, concluded Dr. Peter Markesteyn, Chief Medical Examiner of Manitoba, in a June 1990 statement.²⁴⁵

What the Milgaards gained in publicity they lost in credibility not only with Williams but with the RCMP, the Saskatoon Police and Saskatchewan Justice, who were targets of unfounded ridicule for allegedly tendering dog urine as evidence and claiming it was human semen. Williams, the police and authorities knew the evidence at Milgaard's trial was not dog urine.

Williams said that these unfounded allegations cast aspersions unfairly on the quality of the police investigation, but gave the Milgaards the initial advantage of questioning the integrity of the evidence gathering process, and the analysis that was used at the trial. Williams could not respond publicly and a great deal of public support was generated based on the false information. By the time the federal Minister was able to respond publicly, he said the damage had been done. Undoubtedly, there are still members of the public who believe that dog urine played a role in Milgaard's wrongful conviction.

In addition to unfairly damaging the reputations of the police and others involved in the collection, analysis and presentation of the forensic evidence at trial, the dog urine theory had a detrimental effect on Milgaard's efforts to reopen the investigation and obtain a remedy under s. 690.

At the Inquiry, Williams was asked whether his experience with the dog urine ground influenced his thinking with respect to other information received from Milgaard's counsel. He answered:

It certainly caused us to look at their submissions with a great deal of care, careful scrutiny. ... Because our experiences in examining the earlier bases signaled that some of it was incomplete, some of it was misleading, and to that extent, when you've been bitten once, you are twice shy, you take a look at it very closely, but you look at it, you don't dismiss it peremptorily and so we continued to look.²⁴⁶

4. Efforts to Influence Minister's Decision

As part of their efforts to put public pressure on federal Justice lawyers and the federal Minister to give favourable consideration to Milgaard's application, the Milgaards publicly criticized Williams, the pace of the investigation and the review process.

As Joyce Milgaard and Asper told the Inquiry, they had hoped this aspect of their public campaign would assist in influencing the political decision maker to make a favourable ruling. Joyce Milgaard acknowledged that there was some risks involved with this strategy, and that she had "some concerns"²⁴⁷ that the strategy would backfire if they pushed the Minister the wrong way and upset her with their position.

244	Docid 032096.
245	Docid 032096.
246	T34515.
247	T31061.

There were many news stories written about Williams' work and the Minister's review process. Most were critical of the delay, the lack of information coming from Justice lawyers and the federal Minister and the manner in which Williams was conducting his review. Some of the more significant reports and incidents are detailed below.

(a) Joyce Milgaard's Encounter with the Minister of Justice

On May 14, 1990, Joyce Milgaard confronted Kim Campbell, the Minister of Justice, at a Winnipeg hotel and tried to provide her with a copy of the Ferris report. Joyce Milgaard believed that the Ferris report proved her son's innocence and she was upset that Williams had not responded to the report nor provided a copy to the federal Minister. The Minister refused to accept the report from Joyce Milgaard, and the encounter was widely publicized in the print and television media.

On May 15, 1990 Lett published a report in the Winnipeg Free Press entitled "Minister shuns Milgaard pleas". The article indicated that Joyce Milgaard "got a cold reception from federal Justice Minister Kim Campbell, who pushed past the woman and her daughter as they greeted her at a Winnipeg hotel yesterday."²⁴⁸

Lett also quoted the Minister as saying:

"I'm sorry, but if you want your son to have a fair hearing, don't approach me personally," Campbell said, leaving the Milgaards behind in stunned silence. "I'm sorry, but I want her son to have a hearing that will withstand scrutiny. I'm sorry."²⁴⁹

The article also cited the federal position that "Campbell has repeatedly stated she has not seen the Milgaard file and will not until all the evidence been thoroughly researched and checked."²⁵⁰ Joyce Milgaard is quoted in the article as saying:

"The evidence she has and has had exonerates my son," Milgaard said. "So, let him out."

...

"The public has a right to know what's going on," Milgaard said moments after Campbell had departed. "My son should be free."

...

"This is being covered up. There are people in high places who don't want this out, but we're not going away."²⁵¹

The Winnipeg Sun also published an article on Tuesday, May 15, 1990 entitled "Mom's plea rejected: Fed justice minister won't accept 'proof' jailed son innocent." The article included the following comments from Joyce Milgaard and Minister Campbell:

"Either this report is true and David is innocent, or it's not. That's pretty simple. Even the minister should be able to understand that," Milgaard said.

248	Docid 220898.
249	Docid 220898.
250	Docid 220898.
251	Docid 220898.

"I thought maybe if she could see me face-to-face, and could see here's a family and here's a mother that are really hurting, maybe she would do something. I guess that didn't happen."

...

Campbell said later she can only look at evidence that comes to her through the justice department.

"I'm like the judge in this case. When the file comes to my desk, I have to exercise ministerial discretion on the basis of the evidence before me," the rookie minister said.

"Any suggestion that the minister was swayed by the people involved wouldn't be a credit to the process."²⁵²

The article also discussed the alleged delay in the federal justice department's handling of the investigation:

Campbell said the department has not completed its report because Milgaard's lawyer, David Asper, brought forward new evidence as recently as March 15.

But Asper said the new evidence has nothing to do with the forensic report.

"That excuse is utterly hollow. That report has been in the department's hands since December 1988, and no one has even bothered talking to him," Asper said.²⁵³

Asper and Joyce told the Inquiry that the encounter with the Minister was planned in advance and media outlets had been notified prior to the event. He said the encounter was designed as a photo opportunity between Joyce Milgaard and the Minister, however, "it was impossible to plan the outcome that occurred."²⁵⁴ As Asper testified, the image created when the Minister "blew by"²⁵⁵ Joyce Milgaard "became one of the turning points in the case"²⁵⁶ because "it catalyzed public opinion and got played over and over and over again and ... made Kim Campbell into the evil empire".²⁵⁷ Asper told the Inquiry that he "couldn't have asked for a better response from the minister"²⁵⁸ and viewed the encounter as favourable to their efforts to reopen Milgaard's case.

Williams testified that the encounter with the Minister, and the media's portrayal of that incident indirectly "elevated the Milgaard application from a regional to a national story".²⁵⁹ Publication of the encounter in the print and television media also "brought a certain urgency to the department's efforts to get this matter completed"²⁶⁰. He was also forced to prepare more briefing notes and accelerate the speed of his investigation of the Fisher allegations.

252	Docid 159860.
253	Docid 159860.
254	T26764.
255	T26765.
256	T26763.
257	T26763.
258	T26765.
259	T34463.
260	T34463.

(b) The "Sloppy Probe" Allegation

On June 7, 1990, the Winnipeg Free Press published an article that made a number of critical remarks about the federal investigation of Milgaard's conviction, many of which were attributed to Asper and MP Harvard. The article indicates:

The federal Justice Department has conducted a sloppy and incomplete investigation of David Milgaard's claim of innocence, perhaps wasting another two years of the life of Canada's longest-serving prisoner, an MP and Milgaard's lawyer have charged.

Winnipeg lawyer David Asper said he was shocked to learn federal investigators have not bothered to contact any of the original witnesses in the case, especially since one has already recanted his original testimony.

"How do you explain where 18 months went?" Asper said. "We are insisting that the minister react immediately to this latest evidence. I can only hope they don't use this as an excuse to prolong the whole thing.

"A man is still in jail, I hope they care about that."

...

Asper said despite the growing pile of evidence that indicates his client may be innocent, he has been asked repeatedly by Justice Department officials to remain patient during the investigation process.

"They kept asking me to trust them, but I feel as if the fox has been babysitting the chickens," he said.

Harvard (Winnipeg St. James), who continued grilling Justice Minister Kim Campbell in the Commons yesterday, said he too was shocked at the shortcoming of the Justice Department probe.²⁶¹

Williams testified that the comment that the Department had conducted a "sloppy and incomplete investigation of David Milgaard's claim of innocence" made for "good copy".²⁶² He disagreed with the author's opinion and stated that it painted the department in a very bad light and perpetuated the earlier media line that federal Justice officials would only respond to a "fire"²⁶³ created by the media.

(c) Alleged Mistreatment of Witnesses

In a June 12, 1990 letter to Williams, Asper and Wolch criticized the manner in which Williams questioned Hall and Linda Fisher:

Finally, further to our conversation with respect to the witnesses whom your investigator has interviewed, we can advise that these witnesses were left with a very negative impression about your investigator. Specifically Debra Hall tells us that she was made to feel as though she was wasting the investigator's time. She felt that the investigator was twisting everything that she said, and made her feel "like an ass". Moreover, she indicates

261	Docid 004759.
262	T34685.
263	T34685.

that this investigator made her feel like she was not being believed, and in fact was somehow lying about the contents of her affidavit. Essentially, her impression was that even though she had nothing to gain by coming forward, she was simply trying to say that Messrs. Melnyk and Lapchuk were lying when they gave their evidence at trial, and that for coming forward, she was made to feel "useless in this whole thing".

We understand that Linda Fisher had much the same feeling after your investigators visited with her.²⁶⁴

On June 25, 1990, the Winnipeg Free Press published an article entitled "Justice Department power under scrutiny".

Asper said at least two witnesses provided to justice investigators have complained of being insulted and berated, Asper said.

Asper said the witnesses came forward freely and with no self-interest in the case, except to help shed light on irregularities in the original police investigation. None of the witnesses were accompanied by lawyers when interviewed.

Asper said he realizes the department must challenge all new evidence, but it is unfair to treat these people as if they are being cross-examined in a court.

"It's an adversarial system between counsel in court, but they (Justice investigators) are being adversarial with these witnesses before the court proceedings have begun," Asper said. "If we had known they were going to be so adversarial, then we would have done things much differently."²⁶⁵

Asper testified that he was concerned that the Department of Justice was "investigating, testing, and judging, basically playing investigator and judge"²⁶⁶ in the absence of counsel for the applicant and without the basic tenets of a fair hearing. He had anticipated a less formal form of contact.

Williams denied that his questioning of Hall or Linda Fisher was inappropriate. He indicated that "whether a witness feels good or not about their experience of being questioned is a separate issue from whether the behaviour of the questioner contributed to that bad feeling."²⁶⁷ The accusation of bias didn't disturb him unduly because he felt content that whatever he had done was proper and could be supported by the record. Rather, Williams just viewed the allegation as another form of advocacy and an attempt to alter his future behaviour in terms of questioning witnesses. With respect to putting pressure on the rest of his investigation, Williams said it was "simply a message, you know, we'll complain if you go too hard on our guys."²⁶⁸ They were trying to "persuade us to alter how we conducted the investigation."²⁶⁹

Williams told the Inquiry that he had tape recorded his interviews with Hall and Linda Fisher and provided them to his superior in response to this complaint. On June 29, 1990, Corbett responded to Asper that he had reviewed the record made of the interviews of Hall and Linda Fisher and could "find nothing untoward

264	Docid 010035.
265	Docid 216828.
266	T26953-T26954.
267	T34736.
268	T34736.
269	T34744.

in the manner in which these interviews were conducted."²⁷⁰ The Commission also reviewed Williams' interviews with Hall and Linda Fisher and found nothing inappropriate in Williams' treatment of these two witnesses.

(d) The "Three Stooges" Remark

On July 25, 1990, another article authored by Lett was published in the Winnipeg Free Press. The article opens by paraphrasing Asper as saying the federal Justice department is inflicting "untold psychological damage to David Milgaard by delaying his application for a new trial".²⁷¹ The article goes on to say:

Asper said the Department investigators seemed to be taking their time while his client rots in jail.

"This is supposed to be the final repository of justice in the country," Asper said of appeals to the Justice Minister. "From our perspective, it looks more like the three stooges."²⁷²

Williams testified as to his reaction to the article:

Q Can you comment on what – what was your reaction to this article?

A Disappointment, perhaps a bit of anger. It gave me the impression that here's someone who has one hand tied behind your back so he can punch you in the nose, and what I meant simply by that is this: we received the – the complaint that we were slow and we were delaying things. Within the framework of the then existing 690 process, without the ability to compel the attendance of witnesses and the production of materials, we relied on persuasion to obtain co-operation. We've just discussed the circumstances surrounding the interview of Mr. Wilson and it should be fresh in everybody's mind that although we were in Nakusp in June, Mr. Wilson declined to be interviewed. In fact, the very representatives of the firm that are accusing us of delay and causing the client to rot in jail were the same ones who were demanding or requesting that someone else come in to do the interview and that of course would necessitate delay, so on the one hand there was a complaint about delay, but on the other hand, there were actions which were forestalling the completion of the report.

Admittedly, and to the reader who is not fully apprised of the facts, when you go back to the first paragraph of the article, you'll see that in December, 1988, that is the first date that is mentioned, now this article is July of 1990, a significant amount of time has elapsed. What the reader doesn't know is that first in December, 1988, the application was not complete, trial transcripts weren't received until I believe May. At the initial application two grounds were advanced, but additional grounds had been advanced between December of 1988, as late as June of 1990. One month later, before those grounds are fully investigated, there's a complaint.

I can understand where someone believes that the initial grounds advanced were sufficient to merit a remedy why there might be some limitations. However, because

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of the continued, shall we say, correspondence between the department and representatives of the Milgaards, either with me personally or with Sergeant Pearson who was conducting the investigation of the Larry Fisher matter with me, there was sufficient exchange to dispel the notion that we were tardy in pursuing or in following up on this application and, consequently, the headlines in my view were unfair, but the juxtaposition of the dates of December of '88 and the fact that it was then July of 1990 and the omission to include, that there had been a number of grounds that had been examined, certainly framed us in a very unenviable position. The reference to three stooges, well, comedy is not my first line.²⁷³

(e) The "Elvis Presley" Remark

On August 1st, 1990, David Roberts of the Globe and Mail published an article entitled "Wrong Man Jailed in 1969 Rape Case, Ex-Convict Says". The article related to an alleged jailhouse confession given by Fisher, and stated:

Mr. Corbett noted that, as Mr. Milgaard's supporters provide the department with new evidence on almost a monthly basis, the review of the case has slowed. He had hoped to brief Ms. Campbell on the matter by the end of August, he said, adding that there is no clear-cut evidence to suggest that Mr. Milgaard was intentionally dealt a judicial travesty in 1970.

"Seventeen per cent of people still believe Elvis Presley is alive," Mr. Corbett said in an oblique reference to those who believe in Mr. Milgaard's innocence.²⁷⁴

Corbett's remark about Elvis was repeated in the media after its original publication in the Globe and Mail, and was often referred to by the Milgaards in criticizing the federal Justice Department's approach to the application.

Williams told the Inquiry the remark about Elvis Presley was taken out of context. Corbett debriefed Williams on his conversation with the reporter even before the quotation appeared in media. Corbett told him that the reporter had recited a number of facts that had been reported in the media which Corbett knew were not accurate. According to Williams, Corbett made the comment that "[y]ou can't believe everything you read in the newspaper, because certain journals report that Elvis is still alive"²⁷⁵ while discussing the misconceptions surrounding the facts and conclusions cited by the reporter. Williams said the Elvis comment was taken out of context because the "reporter's take on it is that that was an oblique reference to those who believe in Milgaard's innocence" when in fact "[i]t was an oblique reference to those who believe in the accuracy of the facts recited in certain journals as being 100 per cent correct."²⁷⁶

When asked if federal justice department took any steps to correct the perspective that the Department of Justice was biased, Williams testified that he had spent countless hours discussing the process and procedures of s. 690 applications with members of the press, but most of the time the results of those conversations never found their way into the story.

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Williams testified that the article had the effect of moving the scope of the Milgaard group's complaint to a level beyond him, and certainly added some impetus to complete the investigative work as quickly and as thoroughly as possible.

(f) Allegations of Conflict of Interest

On August 14, 1990, Asper and Wolch wrote a letter to the Minister of Justice alleging that Caldwell was assisting Williams in his investigation of Milgaard's application. At the time, Caldwell was employed with the federal justice department in Saskatoon.

On August 29, 1990, the Winnipeg Free Press published an article citing allegations by "Milgaard's lawyers"²⁷⁷ that a conflict of interest had arisen as a result of Caldwell's involvement in the federal justice department's investigation of Milgaard's case.

In the article, Lett indicates that Williams confirmed that he had conferred with Caldwell on occasion. He wrote "[t]he admission has prompted Milgaard's lawyers, David Asper and Hersch Wolch, to charge Williams with conflict of interest and file a formal complaint with federal Justice Minister Kim Campbell, asking her to intervene immediately."²⁷⁸ The article quotes Asper and Williams:

"If anybody asked me to illustrate a conflict of interest, I could use the example of Caldwell being involved in the investigation of his own case," Asper said. "He is clearly biased. How could they involve him?"

...

"Mr. Caldwell certainly is involved," Williams said. "He was involved in the inception of the case. It would be ludicrous not to consult with the prosecutor on a case that is so complicated."

"It would be ludicrous in terms of finding people when you have someone who knows all the people."²⁷⁹

At the Inquiry, Asper testified that he found it "astonishing"²⁸⁰ that the Department of Justice did not retrieve Caldwell's files and review them for themselves. He also stated that he had a "huge concern that the federal Department of Justice would rely on the original prosecutor to assist him in the re-investigation of the case, and would be relying on the original prosecutor to provide evaluation or analysis of information that may or may not be in his file."²⁸¹ Asper queried why Williams would not be able to do this for himself.

Williams testified that the article was another chapter in an attempt to "keep the story alive. It recites the claim of conflict and suggests that yet there is something else that's wrong with this process for the application".²⁸² According to Williams, Caldwell's conduct was not in issue and he did not view Caldwell as a potential witness, other than to assist in understanding the case. As far as Williams was aware, "there was no sustainable allegation of prosecutorial misconduct."²⁸³ Caldwell was contacted for information, much the same as Williams contacted Tallis and the Saskatoon Police for information. Caldwell was not

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involved in Williams' investigation other than as a source of information. He had no role in Williams' final review nor his advice to the Minister.

Murray Brown said that Saskatchewan Justice became aware of the article and thought the allegations put forth in the article were "rather foolish"²⁸⁴ and "silly".²⁸⁵ He testified:

- Q. And can you tell us, what was your reaction to it, or your response?
- A. Well, politely put, I suppose we thought it rather foolish. The extent to which Bobs Caldwell was involved was he was providing information. Had the Federal government not gone to him for that information, then of course the allegation would have been "well, they are not trying, they are not doing the job so apparently, one way or another, there is corruption involved", or something like that. This just, at this point it just seemed to be more of the nonsense coming out of the Milgaard camp. This was, again, really a very foolish characterization of what was going on."
- Q. Why do you say that?
- A. Because of course the Federal representatives had to talk to Bobs Caldwell, they had to get information from his file, they had to discuss allegations made against him. Of course they would talk to him, and that, I cannot for a moment believe that Mr. Asper would have thought otherwise. My take on this was that this was part of the public relations campaign, not particularly genuine, but necessary to keep the matter in the news media and the pressure on Federal Department of Justice.
- Q. And what effect, if any did this allegation have on Saskatchewan Justice and the administration of criminal justice in Saskatchewan?
- A. Well this, quite frankly, is probably one of the more transparent things that they were suggesting. I don't recall anyone complaining that Bobs Caldwell was involved in the investigation, in fact I can recall a number of people, and mostly lawyers, sort of suggesting that they thought the complaint by Mr. Asper was rather silly.
- Q. And so did Saskatchewan Justice take any steps in response to this allegation?
- A. No.²⁸⁶

(g) Alleged "Feud"

On December 3, 1990, Lett reported that there had been internal wrangling within the federal Department of Justice regarding Milgaard's application. The article cited "sources familiar with the case"²⁸⁷ who indicated that "David Milgaard's application for a new trial is being bogged down by infighting at the highest level of the federal justice department".²⁸⁸ The article also quoted "sources"²⁸⁹ that said "[s]ome senior Justice officials believe department lawyer Eugene Williams has mishandled the investigation

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into Milgaard's application, and are trying to rewrite his report before giving it to Justice Minister Kim Campbell".²⁹⁰

The article cited allegations against Williams for bias and misconstruing evidence during his review of David Milgaard's application:

In addition, Milgaard's lawyer, David Asper, has accused Williams of completely misconstruing evidence obtained during his two-year review of the application.

Asper said concerns about Williams' handling of the case emerged during a meeting in October when he and co-counsel Hersh Wolch met Williams and other Justice Department officials.

"We were also very concerned about the way our application had been investigated ... and that there was very clearly a bias against our client, but for reasons that (Williams) couldn't explain."²⁹¹

The article cited concerns from "lawyers representing other witnesses".²⁹²

Lawyers representing other witnesses have said previously that Williams bluntly told them that he was personally convinced Milgaard was guilty, despite overwhelming evidence to the contrary.²⁹³

At the Inquiry, Williams denied the allegation that he had told lawyers representing other witnesses that he was "personally convinced that Milgaard was guilty".

The December 3, 1990 article prompted the Minister to respond publicly to the allegations. On December 4, 1990, Lett and Douglas of the Winnipeg Free Press published Minister Campbell's response to the article written by Lett on the previous day:

The justice minister also denied any rift within the department complicated her final ruling on whether Milgaard's murder conviction should be retried. She insisted all officials have been "scrupulously fair and careful" in preparing to make an unbiased recommendation.

...

Campbell defended her department after sources familiar with the case said infighting at the highest federal level has delayed a final decision on a retrial for Milgaard, convicted of the 1969 stabbing death of a Saskatoon nurses' assistant.

In Winnipeg, Milgaard's lawyer, David Asper, called Campbell's explanation of the delays "absurd" and yesterday challenged the Minister to make full disclosure about why the application has taken so long.

He said he was afraid Justice Department investigators are trying to determine the guilt or innocence of his client when, in fact, under the provisions of the *Criminal Code*, they are to determine whether it appears a wrongful conviction has taken place.

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It appears the delay in the Justice Department is because of a disagreement between senior bureaucrats, Asper said, and if that's the case, the case should be turned over to a judge to decide.²⁹⁴

Campbell publicly stated that "I am now asked to re-evaluate the case to determine whether it should go back to trial and that is a very serious responsibility and it will be done correctly and according to the very high standard of justice and fairness."²⁹⁵ Campbell was also reported as being concerned about what she considered "an extraordinarily unprofessional approach that is being taken by some people".²⁹⁶

At the Inquiry, Joyce Milgaard confirmed that the plan was to put pressure on the Minister. However, the Minister did not respond in the manner that the Milgaards and their counsel were hoping; they were hoping "that she would do something about the case rather than stand up and defend her actions."²⁹⁷

In his evidence, Williams indicated that he formed the perception during the media campaign that the news articles were designed to indicate that the easiest way to avoid negative pressure on the department would be to give a favourable ruling to Milgaard. However, he did not let it guide his activities, and did not think that the strategy was appropriate. As Williams stated in response to one of the news articles and the media campaign generally, "one way to end it all would have simply been to give up, send it to the courts, send it somewhere, but give a remedy. We chose not to do so."²⁹⁸

Part X – Federal Justice Minister's Decision on First Application

1. Introduction

Eugene Williams completed his investigation of the Milgaard application by the end of August, 1990. He asked counsel for any final submissions and received a letter dated September 10, 1990 summarizing their position. Williams and two senior members (MacFarlane and Corbett) of the federal justice department met with Wolch and Asper on October 1, 1990 to disclose the information gathered by Williams in his investigation, and to hear further submissions.

Following the meeting, Williams' departmental report to the Minister was prepared and sent to officials for review. After the report was sent to the deputy minister, a decision was made to retain the Honourable William R. McIntyre, a retired Supreme Court judge to provide advice to the department. On November 14, 1990, the department provided information and materials to McIntyre. His advice to the department followed on February 7, 1991.

On February 27, 1991, the federal Minister dismissed Milgaard's application for relief under s. 690.

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295	Docid 159802.
296	Docid 159802.
297	T31060.
298	T34738.

2. August 28, 1990 Memorandum of Eugene Williams

On August 28, 1990, Williams provided a memorandum to Assistant Deputy Attorney General MacFarlane, outlining the issues raised in the application, the investigative steps taken and a summary of his findings to date.

(a) The New Evidence from Deborah Hall

Williams noted his November 1989 examination of Hall under oath where she revealed for the first time that she recalled Milgaard's words in the motel as "...I stabbed her I don't know how many times and then I fucked her brains out. Right."²⁹⁹ He noted his interviews of Melnyk and Lapchuk on August 1 and 2, 1990, where each of them vividly recalled the motel room incident and affirmed the accuracy of their trial testimony. Williams concluded that Hall's description of events mirrored that of Melnyk and Lapchuk, although she believed that Milgaard's actions and comments were in jest. He concluded Hall had no new evidence to offer.

(b) The Forensic Report of Dr. James Ferris

Williams reviewed the Ferris and Markesteyn reports, his discussions with Alain and his interviews with Ferris, Markesteyn and Merry.

Williams wrote that "[t]he conclusion in Ferris' report ignores the obvious contamination of the forensic samples. When he was asked to consider the implications of contamination that he himself identified, he concluded as did P. M. Alain, that the forensic evidence neither inculpates nor exculpates David Milgaard."³⁰⁰ Williams concluded that the Ferris report did not prove innocence, nor did it provide any basis for a remedy under s. 690.

(c) Was Larry Fisher the Assailant of Gail Miller?

At the time of Williams' memorandum, the only Fisher ground advanced by the Milgaards was the allegation that Fisher was the true assailant and this proved Milgaard's innocence. Williams outlined the investigative steps taken by him and Pearson of the RCMP. He noted that none of Linda Fisher's evidence established Fisher as Miller's killer, or provided any link. The paring knife she lost did not match the description of the murder weapon, and the fact that Linda discovered her husband at home and had an argument with him did not incriminate Fisher. He noted that she did not discover any blood stained clothing or any clothes missing at the time.

Williams concluded that the fact that Fisher was a convicted rapist did not link him to the murder of Gail Miller:

The circumstances of Ms. Miller's death do not bear a similarity to the offences for which Mr. Fisher was convicted.³⁰¹

(d) Ronald Wilson

Williams reviewed Wilson's June 4, 1990 statement and provided a summary of Wilson's 1969 contact with the police based upon police reports and his interview of Wilson. Williams noted that Wilson's

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charges of police manipulation and coercion are "not supported by his own description of the police behaviour and attitude towards him, when he described their questioning and their investigative procedures".³⁰² He concluded:

His present recall conveniently recites a conclusion, i.e. 'I was manipulated', but does not identify any action other than police questions, in a friendly courteous, albeit persistent manner to support the charge. Similarly the charge of police coercion is not supported by Wilson's description of the tactics used by the police.³⁰³

(e) Albert Cadrain

Williams reviewed Cadrain's June 24, 1990 statement and his interview with Cadrain family members and the police. Williams noted that during his interviews with Albert Cadrain, he "steadfastly maintained the accuracy of his testimony at trial".³⁰⁴ Williams concluded that there was no basis to support Cadrain's allegation of mistreatment by police.

(f) Nichol John

Although not identified as a ground of the application, Williams indicated that John had been interviewed, and said "she told the truth to police when she gave them a statement on May 24, 1969".³⁰⁵ Williams noted that John continues to have nightmares of a scene in which a man is sitting astride a woman in that alley and that her sketch of the scene in her nightmare corresponds to the scene of Gail Miller's murder.

(g) Conclusion

Williams concluded that further investigation (other than a scheduled interview of Estelle Cadrain being pursued by the RCMP) was not required to determine whether there was a probable miscarriage of justice in this case.

I conclude from this memorandum that by August 28, 1990, Williams did not view the application as revealing a probable miscarriage of justice or providing any basis for a remedy under s. 690.

3. Milgaard Final Submissions

In a letter dated September 10, 1990, Milgaard's counsel provided a summary of their final position, including the additional grounds put forward after the original application was filed on December 29, 1988.

Since the filing of our original application on December 29, 1988, there have been many developments, all favourable to David's assertion of innocence that have occurred.

...

Since that time, we have provided your office with additional evidence that overwhelmingly establishes the innocence of David Milgaard.³⁰⁶

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304	Docid 004374.
305	Docid 004374.
306	Docid 004394.

The submission suggests the case presented by the Crown at trial "can be broken into three distinct compartments",³⁰⁷ companions, unsavoury witnesses, and forensic evidence, and that each of them had been addressed in the application.

The submission also dealt with the Fisher ground and the impossibility argument.

(a) Companions

The letter states that Wilson's June 4, 1990 statement "totally recants the incriminating evidence that he gave against David Milgaard"³⁰⁸ and that Cadrain's evidence is "highly suspect due to various psychiatric disorders he was suffering, as well as the various visions which apparently led him to implicate Milgaard".³⁰⁹

(b) Unsavoury Witnesses

The submission contends that the trial evidence of Melnyk and Lapchuk has been "rebutted"³¹⁰ by Hall in her 1986 affidavit, and by Frank in her 1970 statement.

(c) Forensic Evidence

The letter states that Williams was presented "with the two reports of Ferris and Markesteyn, which either totally exonerates Mr. Milgaard, or entirely discredits the forensic evidence tendered at the trial".³¹¹

(d) Larry Fisher

To this point, the thrust of the Fisher ground had been that Fisher was the real killer and therefore Milgaard was innocent, or, if it couldn't be proven that Fisher was the perpetrator, the suspicion about him was enough to support a remedy under s. 690.

The September 10, 1990 letter introduced a new aspect to the Fisher ground. The new ground asserted that Milgaard did not receive a fair trial because evidence of the prior rapes was not provided to his trial counsel before Milgaard's criminal proceedings were concluded, and that had this information been presented to the jury, Milgaard might have been acquitted.

Milgaard was essentially asking the Minister for an opportunity to appeal his conviction on the basis of fresh evidence discovered after his proceedings were concluded. If allowed to go back to the appeal court, Milgaard would apply to have evidence of the prior rapes and Fisher's conviction admitted as fresh evidence, on the basis that the evidence could reasonably be expected to have affected the verdict of the jury, had it been tendered at trial. The applicant had no legal right to go back to the appeal court to have the fresh evidence considered unless the federal Minister referred it to the Court under s. 690.

This new ground did not require proof that Fisher was Miller's killer, but rather focused on the fairness of Milgaard's trial, and whether evidence of the prior rapes could reasonably be expected to have affected the jury's verdict.

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(e) Impossibility Argument

Milgaard's counsel also submitted that based upon the evidence at trial, "the theory of the Crown is not plausible".³¹²

4. October 1, 1990 Meeting

Wolch had expressed an interest in meeting with departmental officials to discuss the application and to give "a perspective of the case personally and fully".³¹³ On September 21, 1990, MacFarlane invited Wolch to do so in a meeting to be held on October 1, 1990. The meeting occupied a full day.

Williams, who was there with Corbett and MacFarlane for Justice Canada, said that their purpose was to provide Wolch and Asper with materials collected by them, and to hear counsel's oral presentation covering all the points they wanted brought to the Minister's attention.

Wolch and Asper were given a few hours in the morning to review three binders of materials containing interview transcripts, and materials from police files and other sources. They were allowed to make copies.

Williams told the Inquiry that some of the above documents would have been shared with Milgaard's counsel much earlier were it not for the fact that Frank's statement of October 1989 given to Asper appeared in a newspaper. Thereafter, Williams delayed disclosure until he had finished his work and could provide information "in a more controlled setting with the necessary precautions against further dissemination".³¹⁴ In the end, Wolch and Asper received:

- the transcript of Williams' examination of Hall;
- the reports of Alain raising issues with respect to the reports of Drs. Ferris and Markesteyn;
- the transcripts of the examination of Wilson, John and Fisher;
- police reports and documents from the prosecutor's file relating to the investigation of sexual assaults, including all of the information Williams had with respect to the seven sexual assaults committed by Fisher.

Much of the meeting was occupied with Wolch and Asper's submissions but Williams said that departmental concerns with the strength of certain grounds advanced in the application were expressed, including the Ferris and Markesteyn reports and the new information given by Hall to Williams.

Williams testified:

Well, there was greater emphasis placed on the impact of this information about the sexual assaults and Larry Fisher's activity, what impact that might have had on the result of the Milgaard trial had it been presented to the jury.

...

Because the initial – the initial thrust of the information surrounding Larry Fisher was here, we've identified the killer, this is the person, and we've looked at it in that context, but the second leg of the argument I guess is had the jury known about this individual residing in the Cadrain residence having done all these things, it might have affected or had an

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314	T32603.

impact so that was one of the other aspects, and that was brought out I guess with greater clarity.³¹⁵

Asper told the Commission that his impression generally was that "the justice officials didn't really think Fisher was all that important or ascribed the same degree of importance to the information as we did."³¹⁶

On October 3, 1990, Wolch reported to Milgaard on the meeting, explaining that he received a number of reports, most of which he had seen before, and that after studying the material for approximately two hours they had a concentrated four hour meeting with federal Justice officials. Wolch had a chance to address any area of the case "that might cause the reviewers to have any negative thoughts".³¹⁷ Wolch told Milgaard they wanted to be certain that Williams' superiors were being properly briefed by him.

Wolch described "a lengthy discussion regarding Mr. Wilson"³¹⁸ without further elaboration. He commented on the discussions about John and said "it was quite easy to point out the absurdity of her statement and the impossibility of same".³¹⁹ He commented that the forensic evidence was reviewed at great length, but he did not mention questions raised by federal Justice officials about the Ferris and Markesteyn reports.

Wolch indicated that "[w]e did have certain facts brought to our attention. It is clear that Deborah Hall in her examination by Mr. Williams in some ways corroborated Melnyk and Labchuk [sic]. But in reading her evidence thoroughly, it became obvious that she was not wavering and she was very clear that there was no re-enactment and that your comments, if made, were sarcastic at best."³²⁰

5. Retention of Justice William McIntyre

After the meeting with Wolch and Asper, the departmental report and recommendations were referred to the deputy minister on November 6, 1990. On November 14, 1990, former Supreme Court Justice William McIntyre was retained and he reviewed the case from then until February 6, 1991. According to Williams, the department "provided information and materials to Mr. McIntyre as and when requested".³²¹ On February 7, 1991 advice was received by the department from McIntyre.

The federal Minister has never publicly disclosed any communication between the federal justice department and McIntyre, asserting solicitor-client privilege. It is not known what material was given to him or what he was asked to review.

6. Federal Minister's Decision

On February 27, 1991, Minister Campbell issued her written decision dismissing the application. Her 12 page letter to counsel contained comments on the s. 690 process and described steps taken by the Department of Justice to examine the application, the issues raised in it, the evidence at trial and she responded to each of the submissions advanced in support of the application.

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319	Docid 162374.
320	Docid 162374.
321	T35891.

Her letter disclosed for the first time that she had retained McIntyre to review and advise her on the application.

During the investigation of this matter, a number of comments were made publicly which tended to suggest that officials within the department were not impartial in their approach to the application. That was simply not the case. At all times I have had and continued to have full confidence that officials within this department have handled the inquiry fairly, objectively and competently, and that their approach to the examination of the case was at times wholly consistent with the best traditions of the criminal justice system in Canada. In view of the allegations that were made, senior officials concluded that, in the particular circumstances of this case, especially in view of the public perceptions that could flow from these unwarranted allegations, it would be appropriate to seek the advice of eminent counsel with considerable experience in matters of criminal litigation. The Honourable William R. McIntyre, Q.C., who practices in Vancouver, was retained for that purpose. Mr. McIntyre has considerable experience in criminal litigation as a practitioner and as a former member of the Supreme Court of British Columbia, the Court of Appeal for British Columbia and the Supreme Court of Canada. Mr. McIntyre has reviewed the case in detail, and has provided his advice to me as well.³²²

The Minister stated her reliance upon McIntyre's advice without specifying what the advice was. Milgaard counsel were at a disadvantage because they were left to wonder what other reasons for dismissal of the application might have been given in advice but not expressed in the Minister's letter.

She identified five issues raised in the application:

1. The new evidence of Deborah Hall and Ute Frank

The federal Minister concluded that the statements of Frank and Hall would not have detracted from the evidence of Melnyk and Lapchuk, and indeed Hall had not only confirmed what Milgaard had said but attributed to him a further admission, detailing a sexual assault perpetrated upon Miller at the time of the murder. She said that Hall's belief that Milgaard's comment was a "sick"³²³ remark and not serious would not have had any effect on the jury.

2. The Forensic Evidence

The Minister noted that Milgaard's status as a non-secretor had been called into question, but even assuming that he was a non-secretor, she discounted the Ferris report, noting that at his interview he agreed that given possible contamination of the sample the forensic evidence neither inculpated nor exculpated Milgaard.

Noting the prosecutor's words to the jury that the forensic evidence neither inculpated nor exculpated Milgaard, she concluded that "The forensic evidence tendered at trial, when elevated to its highest probative value, is neutral, establishing neither guilt nor innocence".³²⁴

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3. Ronald Wilson and Albert Cadrain

The Minister said that careful consideration was given to Wilson's allegations of undue police pressure, coercion and manipulation. She concluded that "Mr. Wilson's characterization of those events grossly exaggerates what occurred, and may reflect a misunderstanding of the then existing polygraph procedures";³²⁵

In June 1990, Mr. Wilson also stated that he began to implicate Milgaard after lengthy interviews by police authorities. However, in July 1990, he acknowledged that he had forgotten that he had implicated Milgaard in Regina before he arrived in Saskatoon, where he was interviewed by police. I consider this oversight by Mr. Wilson to be very important in assessing the allegations of police coercion and manipulation that he advanced to explain his incriminating statement of May 1969, and his trial testimony.³²⁶

She noted Wilson's acknowledgment that the questioning by police was polite and courteous and that the tone of the interview was pleasant and that he was neither threatened nor induced by promises to provide the 1969 statement, having confirmed this at his preliminary inquiry, at trial, and during his 1990 interview with Williams. The only evidence supporting the proposition that Wilson's evidence was coerced, planted or fabricated by police was his bare assertion to Henderson. She said:

The current retraction by Mr. Wilson of much of his trial evidence is unconvincing.³²⁷

As for Albert Cadrain, she said that little weight could be given to the suggestion that his trial testimony was unreliable:

While Mr. Cadrain experienced personal and emotional difficulty after the trial, his trial evidence was confirmed by other witnesses and has since been confirmed by inquiries conducted during this application.³²⁸

She concluded that his personal difficulties since the trial did not detract from the credibility of the evidence he provided during the trial.

4. Larry Fisher

She described the Fisher issue as "the allegation that one Larry Fisher may have committed the crime and the impact that unsolved rapes in Saskatoon could have had on the jury's deliberations".³²⁹ She clearly identified both aspects of the Fisher ground.

Her letter devoted one paragraph to the first aspect of the Fisher ground but did not expressly respond to the second.

Under the heading "The impact that Larry Fisher's criminal behaviour could have had on the jury's deliberations"³³⁰ she reviewed the evidence advanced to link Fisher to Miller's murder. She discounted Linda Fisher's evidence regarding the knife noting that it was different than the murder weapon and

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concluded that although Fisher lived at the Cadrain residence during Milgaard's visit, "no guilt or suspicion of guilt can be attributed to Fisher in the absence of some form of evidence linking him to the crime".³³¹

Despite having flagged the issue of "the impact that unsolved rapes in Saskatoon could have had on the jury's deliberations" she failed to expressly address it, although in her preliminary comments, she stated:

Respecting some of the points raised, there are no reasonable grounds to believe that the evidence or information made available would have affected the verdict of the jury at trial.³³²

It is not clear whether this general finding was meant to include the evidence of the unsolved rapes.

At the Inquiry, Williams could not be asked any questions regarding his communications with the Minister and could not explain why she had not specifically addressed the second aspect of the Fisher ground in her decision. He told the Inquiry:

Q Can you comment on, after you had investigated Mr. Fisher and concluded that there wasn't a link between he and Gail Miller, what if any conclusions did you make regarding this miscarriage of justice based upon the fact that Mr. Milgaard did not have an opportunity to raise these offences in his proceedings?

A I think one of the observations you would make is recognize that the absence of the opportunity to put that evidence before a jury, you know, might have, or could have had some impact on the result of the deliberations. In the context of the 690 process, it's one of those situations in which it would be examined, but it would be examined in the context viewed in the strength of the case that remained to support a conviction of David Milgaard, so it's one of those factors that is presented and could have had an impact or an effect had the minister chosen to give it more weight than it was given.

Q And are you telling us that that necessarily involves a review of the strength of the case against David Milgaard?

A It does.³³³

Fourteen months later, the Supreme Court of Canada, in a Reference requested by the same federal minister, concluded that evidence of the Fisher assaults (and other new information) "constituted credible evidence that could reasonably be expected to have affected the verdict of the jury"³³⁴ and recommended to the federal Minister that Milgaard's conviction be set aside and a new trial ordered.

5. Submissions that David Milgaard could not have killed Gail Miller

This ground related to efforts by the Milgaards to re-argue some of the matters determined by the jury. The Minister indicated that these matters had been properly left to the jury.

331	Docid 001529.
332	Docid 001529.
333	T38987-T38988.
334	Docid 008879.

The Minister concluded:

The information provided by Deborah Hall does not detract from the evidence led at trial, and Mr. Wilson's present recollection of the events in question is palpably unreliable. The suggestion that the forensic evidence exculpates David Milgaard overstates the value of that evidence, which established neither guilt nor innocence. Further, there is no reliable basis to believe that Larry Fisher was connected in any manner with Gail Miller's death. The submissions concerning the location of the offence and Mr. Milgaard's opportunity to commit the offence were fully canvassed by trial counsel and by the judge who properly charged them on that point. There is no body of new evidence which constitutes a reasonable basis for believing that a miscarriage of justice likely occurred in this case, or, to adopt the test suggested by you during submissions, there is no basis to conclude that a miscarriage of justice may have occurred here. Accordingly I am not prepared to refer this case back to the courts.³³⁵

Notable by its absence from this concluding paragraph is any mention of the fact that Milgaard's jury was not provided an opportunity to consider the unsolved rapes and the effect this evidence might have had on the verdict. The Minister either overlooked it or considered it to be of no importance, in contrast to the view taken later by the Supreme Court of Canada.

7. Milgaard Reaction to Minister's Decision

Not surprisingly, the Milgaards were upset with the federal Minister's decision. Both it and the review process were criticized in the media. Williams told the Inquiry that by the time the Minister's decision was released, many of the facts reported were incorrect, but it was "too late to undo what had been done. No one could understand how, in light of all of the evidence, 'to the contrary', the Minister of Justice could come up with a contrary opinion."³³⁶

The media reaction, he said, was predictable. Throughout the application the only side of the story that had been presented in the media was the one advanced on behalf of Milgaard, and no matter how well the federal Minister tried to explain the facts in her decision, it did not seem to matter.

On March 12, 1991, the David Milgaard support group "officially declared War on the Minister of In Justice, Kim Campbell and her department".³³⁷

During a news conference that day, Asper was quoted as saying "her decision is an outrage. Either she got bad advice and didn't exercise due diligence, or she is an active co-conspirator in this injustice."³³⁸

On March 12, 1991, David Milgaard and his family sent a seven page letter (drafted by Asper) to the federal Minister, and to the media setting forth their strong objections to the decision.

The letter identified a number of concerns with the s. 690 review process and the federal Minister's decision:

- federal Justice officials ignored or misunderstood evidence.

335	Docid 001529.
336	T34436.
337	Docid 162441.
338	Docid 026541.

- the Minister's decision was essentially a retrial of the case and she acted improperly by exercising the function of a court in weighing evidence and credibility. She had conducted a trial in the absence of counsel for Milgaard.
- the federal Department of Justice, in charge of prosecuting crimes, are prosecutors and naturally biased.
- Corbett was quoted as equating those who believe in Milgaard's innocence with those who believe Elvis Presley is alive.
- there was actual bias in that Caldwell worked in collaboration with federal Justice officials in reviewing the application.
- federal Justice officials were "caught acting in a manner inconsistent with their duty"³³⁹ and this was the reason the federal Minister had to get outside counsel.

The Milgaards strongly criticized the Minister for retaining "independent"³⁴⁰ counsel without informing them or allowing their participation:

The real decision in this case was made when you referred the case to Mr. Justice McIntyre, and it is astonishing that you believe otherwise. You referred this case to a retired judge for his opinion, and you excluded counsel.³⁴¹

In addition to criticizing the process, the Milgaards took issue with some of the Minister's findings:

Perhaps the greatest example of the unfair assessment given to the Milgaard application is the interpretation of the evidence given by Deborah Hall, both by affidavit and her sworn evidence to Mr. Williams.

...

Your conclusion that neither Ms. Frank nor Ms. Hall would have detracted from the evidence of Messrs. Melnyk and Lapchuk is grossly wrong. Moreover, it adopts an intellectually dishonest analysis of the evidence provided to you by your department.³⁴²

On the forensic evidence, the letter continues:

The intellectual dishonesty of your decision is magnified by your dismissal of the forensic evidence.³⁴³

Complaint was made with the fact that the Minister gave no weight whatsoever to Markesteyn's questions about whether the samples in question were even in fact human semen. This of course was referring to the dog urine speculation.

As for the Fisher ground:

With respect to Larry Fisher, it would appear that you have completely missed the point insofar as the relevance of this information is concerned. The jury was entitled to know that there was an extremely violent serial rapist living in the basement of the home that Milgaard ultimately visited. Moreover, the jury was entitled to know that this individual had previously

339	Docid 165532.
340	Docid 165532.
341	Docid 165532.
342	Docid 165532.
343	Docid 165532.

attacked two women who resided in that neighbourhood. Moreover, the jury was entitled to know that Larry Fisher took the same bus to work as did Gail Miller. It may have been a critical point in the defence of this case for the jury to not only conclude that someone else other than Milgaard may have committed the crime, but also be able to identify the likely perpetrator.³⁴⁴

In fact, before and during trial, nobody knew that Fisher was "an extremely violent serial rapist living in the basement of the home that Milgaard ultimately visited",³⁴⁵ nor that he had previously attacked two women who resided in the neighbourhood. Had the authorities known that, then of course the evidence would have been relevant and should have been disclosed. If the writer meant that a second jury on a new trial should hear such evidence then the point is a valid one.

On April 25, 1991, Wolch sent his own letter to the federal Minister setting out his concerns. He objected to the application being reviewed by a "Crown prosecutor"³⁴⁶ and expressed concern with the referral to McIntyre asking "if our position was argued in front of him, who presented our position and what did he say?"³⁴⁷

Wolch commented that "given the matter was referred to Justice McIntyre, why was it not referred to a court with the natural safeguards, such as both parties being given a chance to be heard".³⁴⁸

Wolch also took issue with the manner which the federal Minister dealt with the Hall ground. In the letter he makes reference to Melnyk and Lapchuk saying that they were "paid by the Crown young criminals".³⁴⁹ Wolch also states:

Even to this day we do not know what arrangement was made for them to secure their evidence. A member of your department implied to us that they were paid.³⁵⁰

There was no evidence that either Melnyk or Lapchuk were paid by the Crown to testify at Milgaard's trial, and there was no evidence at the Inquiry to support Wolch's contention that a Justice department member implied they were.

8. Role of Saskatchewan Justice and Response to Minister's Decision

Saskatchewan Justice was not directly involved in the s. 690 decision. They did not participate in the investigation, the review, or the decision making process. Both they and Saskatoon Police relied upon the federal Minister's decision. As a result, no steps were taken to reopen the investigation into Gail Miller's death.

Saskatchewan Justice had no legal ability to set aside Milgaard's conviction nor to return his matter to the Court. That power lay exclusively with the federal Minister, but any decision she made under s. 690 had a direct effect on Saskatchewan Justice and the administration of criminal justice in the province. If the conviction were set aside and a new trial ordered, the Saskatchewan Attorney General would prosecute Milgaard. If referred to the Saskatchewan Court of Appeal, the Attorney General would be the respondent.

344	Docid 165532.
345	Docid 165532.
346	Docid 212782.
347	Docid 212782.
348	Docid 212782.
349	Docid 212782.
350	Docid 212782.

The federal Minister's decision under s. 690 also affected Saskatoon Police. The investigation into the death of Gail Miller had been conducted by them. If Milgaard's conviction were set aside, the responsibility to reinvestigate Miller's death would again fall to them.

Saskatchewan Justice might have reinvestigated the death of Gail Miller while Milgaard's conviction was still in place, but practically speaking they would not charge someone else with the crime before his conviction was set aside.

Both Saskatchewan Justice and the Saskatoon Police were aware of the allegation in Milgaard's application, that Fisher was Miller's killer, but they also knew that the allegation had been investigated by the RCMP and considered by the federal Minister in dismissing the application. Relying upon that, they did not reopen the investigation, and that reliance was reasonable given that a virtual reopening of the Miller murder investigation had taken place during the RCMP inquiries into Fisher, as part of Justice Canada's review of Milgaard's application.

Justice Canada investigators had received full cooperation from both Saskatchewan Justice and Saskatoon Police, with the disclosure of documents and the cooperation of their personnel.

Brown testified that had Milgaard counsel requested access to the prosecutor or Saskatoon Police files, they would have received it, but no such request was made.

Contacts between Justice Canada and Saskatchewan Justice concerning Williams' investigation of the first application were infrequent. Saskatchewan did not receive his departmental report, his advice to the Minister, or McIntyre's opinion. Brown was able to review the latter only when preparing for the Supreme Court Reference.

Although acutely aware of media allegations relating to police and Saskatchewan Crown conduct, Saskatchewan Justice was prepared to let the federal investigation run its course. But for that, Saskatchewan Justice would have investigated the allegations because of their adverse effect upon the administration of criminal justice in the province.

Although discounting much of what was being reported, Saskatchewan Justice refrained from publicly responding in deference to the pending s. 690 application. Unfortunately, the lack of response contributed to public skepticism about the administration of criminal justice. Brown testified that they have learned from the experience, and now respond immediately to allegations of this kind, to ensure that the public has the correct facts.

Part XI – Second Application

1. Preparation of Second Application

The Milgaards did not accept the federal Minister's February 27, 1991 decision and vowed to take further steps. They considered challenging the Minister's decision in Court but ultimately decided to file a second application under s. 690. The Milgaards remained convinced that Fisher was Miller's killer, and focused their second application exclusively on Fisher, with more emphasis on the similarities between Fisher's sexual assaults and the Miller murder.

In the first application, the Fisher ground was not raised until 14 months after the application was filed and it was not fully articulated by Milgaard's counsel until after the investigation of the application had been

essentially completed. The other grounds of the application challenged evidence presented at Milgaard's trial. None of these was found to have merit and the federal Minister concluded that the case presented against Milgaard at trial remained essentially intact.

In April and May 1991, Joyce Milgaard and Henderson interviewed each of the Fisher victims seeking details of their assaults. Except for Fisher Victim 7, the victims did not provide statements. Henderson prepared a memorandum outlining his version of what each victim said in the interview. This information was used by Centurion Ministries to prepare an analysis and comparison of the Fisher assaults and the Miller murder. The Centurion Ministries summary, and Henderson memorandums formed the basis of the second application.

Before filing the second application, the Milgaards obtained a statement from Miller's family supporting their application. The family said that in light of the new evidence presented to them by Centurion Ministries (the analysis of Fisher's assaults) "we feel there is reasonable doubt as to the guilt of David Edgar Milgaard. We are making this statement simply because we want justice to prevail!".³⁵¹

Milgaard counsel also contacted Saskatchewan Justice in advance of filing the application. Wolch wrote to Ellen Gunn, then Director of Public Prosecutions on August 8, 1991, stating that it was only recently brought to his attention that the Attorney General for Saskatchewan was not involved in the first application other than receiving a copy of the federal Minister's reply.

Wolch provided all of the materials that he had filed with the federal Minister on the first application, as well as the summary of Fisher's crimes, that was to be filed with the second application.

In the letter Wolch explains that the matter is "going to receive a considerable amount of publicity in the extremely near future",³⁵² and that he is sending the material to Saskatchewan Justice as "it is our intention if questioned to indicate that we have forwarded some material to your department and are forwarding more, and we expect that the matter will be given careful consideration".³⁵³

Brown testified that Wolch was simply trying to get Saskatchewan Justice "on his bandwagon."³⁵⁴ A few days after the letter was received, there were a number of comments in the media by Milgaard's counsel indicating that materials had been sent to Saskatchewan Justice, and they were considering ordering a new trial. Saskatchewan Justice could not order a new trial, was not considering it, and did not take a public position with respect to the application.

2. August 14, 1991 Application

On August 14, 1991, Wolch filed a new s. 690 application with the federal Minister. The application was based upon a "Summary of the Centurion Ministries investigation into the crimes of Larry Fisher",³⁵⁵ which was an analysis of Fisher's sexual assaults (plus one that Fisher did not commit) derived from interviews with the victims.

351	Docid 000084.
352	Docid 010080.
353	Docid 010080.
354	T37374.
355	Docid 000901.

The Milgaards believed their second application had to have information or grounds different from what was presented in the first application. In Wolch's letter accompanying the application, Wolch asserted that the second application was different in the following respects:

- In the first application "the suggestion that Larry Fisher was the perpetrator was not the main thrust, and we were at that time advised by your department that there were no police reports available on past offences of Mr. Fisher."³⁵⁶
- Although the first application suggested there was a distinct pattern between the Fisher offences and Miller murder, "the similarities were never placed before you".³⁵⁷
- They were "somewhat surprised to learn that there was ample material available, including at least one police report concerning previous victims of Fisher".³⁵⁸

Williams took issue with Wolch's characterization of the first application:

- Williams denied that he told Wolch on the first application "that there were no police reports available on Fisher's past offences".³⁵⁹ Williams wrote to Corbett on August 20, 1991:

The applicant had mistakenly assumed that the similarities between the attack on Gail Miller and the Fisher assaults were not brought to the Minister's attention or considered during the first application. This assumption is based on a mistaken recollection of a conversation I had with Mr. Wolch.

I had told Mr. Wolch that the occurrence reports for the 1968 assaults in Saskatoon were not available, and that the quality of the photocopy of the 1970 assault in Saskatoon was poor.

However, I had obtained sufficient information relating to the October – November 1968 charges from court documents and considered this information during the assessment of the first application. I had also obtained and considered the occurrence reports from the Winnipeg assaults.³⁶⁰

- Williams had reviewed the circumstances of the Fisher assaults and determined that there were no similarities to the Miller murder, and he provided this information to the federal Minister.
- The "new" police report referred to by Wolch was the 1970 assault file which Williams had on the first application, and provided to Wolch in 1990. Williams had all of the material available from police files on the first application, other than partial information from a 1968 assault file which was located in September 1991. Williams had other material available on that assault. He provided all of the information he had on all assaults to Wolch in October 1990.

Wolch identified the ground in the new application as follows:

... Centurion investigators developed a startling profile showing the similarity of all of Fisher's attacks and of that committed against Gail Miller. I am enclosing statements of the victims and a summary of the findings which contain the striking similar acts that would

356	Docid 000901.
357	Docid 000901.
358	Docid 000901.
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360	Docid 151828.

be admissible in a trial against Larry Fisher and would have been admissible in David Milgaard's trial if the information had been known.

...

In light of the above, I would ask you to treat this letter as a fresh application to open the Milgaard case. It is our view that had you been aware of these additional developments your decision would not have been the same.³⁶¹

The second application did not provide much new in the way of information, and advanced as its only ground, one that was considered and rejected in the first application. Williams told the Commission that if the Centurion Ministries report and the other information filed with the second application had been filed on the first application, it would not have changed his conclusion regarding the merits of the Fisher ground.

3. Allegations of Frame and Cover-up

There was much public reaction to the Minister's decision on the first application, particularly concerning her insistence on maintaining secrecy with respect to the information she received and reviewed from McIntyre and others. There was considerable pressure from Saskatchewan Justice and the public for the federal Minister to disclose the basis of her decision, and to have a public process to deal with the Milgaard case.

The Milgaards took full advantage of their public support, intensifying the media campaign for the filing of the second application. The campaign focused on the allegation that Milgaard was framed by Saskatoon Police, and that there was a deliberate cover-up of the Fisher convictions. Despite making allegations of frame and cover-up in the media, the Milgaards did not include them as grounds in the second application to the federal Minister.

The Milgaards used Centurion Ministries to deliver this message in the hope that its reputation would add to the credibility of their cause. There was no evidence of a frame or cover-up, but the allegations attracted national and international media attention.

James McCloskey of Centurion Ministries came to Canada to launch the media campaign in conjunction with the filing of the second application. The Milgaard group delivered the message across Canada, including the federal Minister's home riding in British Columbia. Not surprisingly, the allegation of "frame and cover-up" hit the front pages of many newspapers, and was the lead story on many newscasts.

One of the first reports of the cover-up allegation came in Lett's article on Sunday, August 11, 1991. The headline of the front page story says "Serial rapist, not Milgaard, is 'killer', Saskatoon cops covered sex offender's tracks, probe says".³⁶² In the article he writes:

Saskatoon police covered up the 1970 conviction of a serial rapist whose crimes were identical to the murder for which David Milgaard was convicted, for fear it would prompt a review for wrongful conviction, a new investigation has charged.³⁶³

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362	Docid 160026.
363	Docid 160026.

In the article McCloskey is quoted:

"Once Fisher confessed (to the other rapes), it would have really looked bad and humiliated them to reopen Milgaard," said McCloskey. "So they covered up their tracks and covered up the crime."³⁶⁴

Henderson was quoted as saying:

"It looks like a deliberate cover up of (Fisher's) arrest and conviction."³⁶⁵

The following day, the Winnipeg Sun carried a story with the headline and a photograph of Joyce Milgaard saying "Mom alleges cop coverup",³⁶⁶

On August 16, 1991, McCloskey had a press conference in Toronto where he detailed the Centurion Ministries report and his views on Milgaard's application. His news conference was widely reported.

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The StarPhoenix ran a front page story with the headline "Milgaard Framed, Group Contents".

StarPhoenix

Friday, August 16, 1991

Suggested Price: 52 Cents Mon. to Thurs.; 75 Cents Fri. and Sat.

Inside today

Electronics

buyers beware E8

Milgaard framed, group contends

By Dan Zakreski
of The Star-Phoenix

Saskatoon city police framed David Milgaard for the murder of Gail Miller in 1969, alleges the head of a U.S. group which investigates suspected cases of wrongful conviction.

City police Sgt. Dave Scott denied the charge Thursday and refused to comment further.

Jim McCloskey, founder of the New-Jersey based Centurion Ministries, says the Saskatoon police department coerced testimony from witnesses to manufacture a case against Milgaard. The department needed a scapegoat because the murder followed a series of brutal rapes in the city and they had no suspects, he said.

McCloskey's non-profit group is dedicated to investigating cases where individuals may have been wrongly convicted of a crime. Since 1983, the group has freed eight death row or life prisoners in the U.S.

McCloskey has called a news conference in Toronto today to detail his allegations.

"Of all the cases we've worked on in the past 10 years, I've never had such a case where the original conviction against the defendant has completely unravelled as it has against David," McCloskey said Thursday.

"On the other side of the same coin, we've also been able to, in clear and convincing terms, identify the real killer."

McCloskey said an 18-month investigation revealed "a staggering amount of information" that pointed to a man named Larry Fisher — a convicted rapist whose victims included women in Saskatoon — as the person who murdered nursing assistant Gail Miller. Fisher lived two blocks away from Miller at the time of her murder.

In an interview with CBC-TV last year, Fisher said: "I had nothing to do with that murder."

Joyce Milgaard, who sought the group's help for her son in 1989, says Centurions got involved last year after she approached it with Fisher's possible connection to the case.

McCloskey said a Centurion investigator interviewed the Fisher rape victims earlier this year.

"In each of those incidents, five or six characteristics that Larry Fisher did with each of these was also done with Gail Miller. It's a clear modus operandi."

The series of rapes in Saskatoon before the Miller murder had placed incredible pressure on the city police to solve the crime, he said. Newspaper reports at the time confirm that, immediately following Miller's murder, police were exploring the possibility the serial rapist had also killed Miller.

"When you know what happened to those three rape victims, and compare them to what happened to Gail Miller, it doesn't take a rocket scientist to figure that out," McCloskey said.

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On August 17, 1991, the StarPhoenix reported comments from McCloskey at the news conference the day before. The front page carried a headline "'Frame' Alleged" and a report stating that "... McCloskey concludes Saskatoon Police framed Milgaard."³⁶⁸ A related article stated:

With emotion usually reserved for the pulpit, Jim McCloskey presented the case for David Milgaard Friday morning and pointed the finger squarely at the Saskatoon city police.

McCloskey, the head of Centurion Ministries, a non-profit American organization which investigates claims of wrongful convictions, told the news conference Saskatoon Police have known for years that Milgaard is innocent. ... He said pressure to arrest someone for these violent attacks prompted the police to frame Milgaard.

McCloskey said three individuals who gave important testimony in the Milgaard case, Ronald Wilson, Albert Cadrain and Nichole John – were "terrorized and coerced" into cooperating.³⁶⁹

On August 21, 1991, a story appeared in the Saskatoon StarPhoenix, Regina Leader Post and Moose Jaw Times Herald alleging that Melnyk and Lapchuk were paid by the Crown to testify at Milgaard's trial.

The StarPhoenix headline read, "Two Milgaard witnesses paid, lawyer suggests".³⁷⁰ The article referenced an allegation Wolch made in his April 25, 1991 letter to the federal Minister, which had been provided to the media. In reference to Melnyk and Lapchuk, Wolch wrote "a member of your department implied to us that they were paid".³⁷¹

None of this was true. Melnyk and Lapchuk were not paid for their evidence. Caldwell adamantly denied this allegation. Williams confirmed that no one in his department, to his knowledge, gave that impression or information to Wolch.

There was no evidence at the time, nor is there now, that Milgaard was deliberately framed by the Saskatoon Police nor that they or the Saskatchewan Crown covered up the convictions of Larry Fisher.

Murray Brown told the Commission that at the time these allegations were made, Saskatchewan Justice gave no credence to these allegations. He said:

There's no evidence indicating that any of that has any basis other than speculation. If they had been able to bring forward one ounce of evidence that the Saskatoon police had framed anybody or that there had been any kind of cover-up, we would have been concerned, we would have looked into it, and all this was speculation and excited publicity over this whole thing.³⁷²

The media campaign was designed to put public pressure on the federal Minister to allow Milgaard's case to be determined in a public and judicial forum. In some respects the campaign was successful, as the "public pressure" played a significant role in the federal Minister's decision to refer the case to the Supreme Court.

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369	Docid 325149.
370	Docid 057439.
371	Docid 057439.
372	T37412.

4. Federal Justice Response to the Application

The second application repeated arguments advanced in the first application, but with more detail about the previous Fisher assaults. In the first application, Williams had looked at the circumstances of the Fisher assaults and concluded that they were not similar to those of the Miller murder.

Although the second application differed little in essence from the first, the adverse public reaction to the Minister's rejection of the first was such that a different response was warranted.

By the time the second application had been filed, Brown told the Commission that "everyone understood that something had to be done publicly and whatever was done publicly would end up involving us [Saskatchewan Justice]."³⁷³ Brown said federal Justice officials were slowly coming around to the view that a public process had to occur to deal with the Milgaard case. Reading between the lines, Brown said that the federal justice department was beginning to feel political heat.

Brown testified that the federal Minister's failure to release the McIntyre information to the public had a great deal to do with the situation she faced in August 1991. Saskatchewan Justice had unsuccessfully urged the federal government to release the advice which the Minister had been given, and to release the information which her department had relied upon, so that the Milgaards and the public could see the basis for her decision. Their failure to do so helped to fuel the cover-up and corruption campaign.

The concerns and position of Saskatchewan Justice were expressed in an internal memorandum prepared by the Director of Public Prosecutions in late August or early September 1991. In the memorandum she wrote:

The federal minister reviewed all the materials collected in this process and sent materials to Mr. Justice McIntyre, formerly of the Supreme Court, for an 'independent review'. A letter was then sent to Mr. Milgaard denying the application. We received a copy. No other material gathered by the federal department has been made public in the process. The only material which has become public has been the material released by the Milgaard family and their counsel. This has not been countered in any way by the federal department of justice and tends to lead to the growing speculation that justice was not done in this case.

The federal department has declined to provide us with copies of the materials either. They have made certain statements about the parole board and about the decisions which have been made concerning Milgaard's release – indicating that he has not been released because he is dangerous. Not because he hasn't confessed. However we have not been given access to any of those files. They have also indicated that they have located additional witnesses who may be helpful at trial if the matter goes back to trial, however the witnesses do not want to be identified at this time.

The secrecy surrounding this matter and the continuing body of material being publicized by the defence is leading to a clear problem with confidence by the public in the administration of justice in this province and in Canada.

The question to be addressed is whether the province ought to take a position as to whether the case should be referred to the Court of Appeal. Without a full case file to review, it is difficult to conclude that the federal minister's decision is right or wrong.

Without some sort of public accounting or review, [it] would appear [that] the outstanding questions about the system will not disappear.

Our initial view is that the federal government should be encouraged to make a public accounting of what led them to the conclusions they reached. Additionally, that we should receive a full copy of their file to do our own assessment.

A new application is outstanding at this time. Based on the limited information we currently have, it would not appear that the actions of Mr. Fisher would in law constitute similar fact. However, the fact that the new application has been made obviously gives the opportunity to do the 'right thing' whatever that is.³⁷⁴

Brown added that he did not have any doubts about the Minister's decision being correct, it was more an issue about what the public believed. He testified that much of the information portrayed in the media was inaccurate and misleading, leaving the public with the wrong perception of the true facts involved in the Milgaard case. Although the Milgaards and the media were ultimately proven to be right (that Milgaard was innocent and Fisher the perpetrator), the authorities considering these issues at the time needed credible evidence supporting these contentions rather than bald assertions supported by contrived and unreliable evidence. The authorities operated on the presumption that Milgaard's conviction was valid unless he could establish credible grounds to the contrary.

The public was being told that Milgaard was convicted on the basis that dog urine was presented to the jury as Milgaard's semen, Cadrain was tortured, Wilson was brainwashed, Melnyk and Lapchuk were paid to give false evidence and Ferris' report proved Milgaard's innocence. Public concern was understandable. However, the authorities could only respond to credible evidence, and when they reviewed these allegations, they found them to be without merit.

It has been observed that many of the allegations were so lacking in credibility that they might have undermined the significance of the Fisher information. The authorities suspected Fisher, but without credible evidence to challenge the case against Milgaard, or evidence linking Fisher to Miller's murder, authorities were left with only speculation as to Fisher's involvement.

Although federal Justice had doubts about the substantive merit of the second application, it was concluded that a public process was necessary to respond to the second application. As explained in the memorandum prepared by the Saskatchewan Director of Public Prosecutions, the second application gave the federal Minister the opportunity "to do the 'right thing'",³⁷⁵

When it became apparent that the federal Minister's response to the application would involve a public and judicial process, investigative emphasis favored that process as opposed to gathering evidence to help the Minister make a decision on the merits.

After the second application was received and before the federal Minister ordered the Reference at the end of November 1991, some investigative steps taken were taken by federal Justice officials, and new information appeared.

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(a) Investigation of Victim 8 Assault

In addition to the seven sexual assaults for which Fisher had been convicted, the second application made reference to an unsolved 1968 assault which the Milgaards claimed Fisher had committed. In May 1968, Victim 8 was assaulted in a south east Saskatchewan resort by an unknown assailant. Following Milgaard's conviction for the Miller murder, Victim 8 came to believe, despite lack of evidence, that he had also assaulted her. Victim 8 contacted Joyce Milgaard in 1991 saying that she believed her son had raped her in 1968. She asked for an opportunity to meet David or see his picture to confirm her suspicions.

In May 1991, Joyce Milgaard and Henderson interviewed Victim 8. They claimed that she had changed her mind and identified Fisher as her assailant rather than Milgaard. On this basis the Victim 8 assault was included in the application to the Minister as a Fisher offence, part of the chain of similar fact evidence.

Federal Justice officials were not aware of this assault prior to the second application, and assigned Pearson of the RCMP to investigate the allegation that Fisher raped Victim 8 in circumstances that were "strikingly similar" to the Miller murder. But when interviewed by the RCMP, Victim 8 said that Milgaard was the assailant. Asked about her meeting with Henderson and Joyce Milgaard, and how the Milgaards had concluded that Fisher was Victim 8's assailant, she said that she knew nothing about Fisher and had never alleged that he was the assailant.

Victim 8's description of the assailant in 1968 is significant. She described him as being over six feet tall and white, but that she had not seen his face – only his hands. In the following week, two local newspapers published a story regarding the incident and described the assailant as "believed to be white, about 6' tall".

Lacking suspects, RCMP closed the file in September 1968. Neither Fisher nor Milgaard were suspects in the initial investigation, and there is no evidence that either man was even in the vicinity at the time.

In 1991, Victim 8 told the RCMP that she had always believed that Milgaard was her assailant. In 1968, when the RCMP returned her clothing they said something to the effect "we got the guy, he doesn't live far from here".³⁷⁶ She might have gotten the idea from the police in 1968.

The publicity surrounding the Milgaard case in 1990 caused her to think about the assault again, so she contacted Joyce Milgaard to arrange a meeting, wanting to see a picture of David and to meet him to confirm or refute her suspicions.

Joyce Milgaard and Victim 8 agreed to meet at a motel in Regina, but the meeting was cancelled by Joyce Milgaard, according to Victim 8, when Victim 8 came with a friend. Joyce Milgaard's version was that Victim 8's friend hung up on her when she tried to arrange the meeting. It did not occur as planned.

Aware that Victim 8 was returning home the next day by bus, Joyce Milgaard and Henderson approached her at the bus depot. She was alone. Victim 8 asked to see pictures of David. Instead, Joyce Milgaard showed her one of Fisher. Victim 8, thinking it was a picture of Milgaard said that she did not recognize the person in the picture and she told Joyce Milgaard that this was not the person who assaulted her. Joyce Milgaard told her "yes, this is the man who attacked you. He's a serial rapist and he admitted to attacking other women and killing Gail Miller."³⁷⁷

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Victim 8 told Pearson that when she looked at the picture and turned away saying it was not him, Henderson said something like "yes, I think she recognized him".³⁷⁸ Her request to Joyce Milgaard to see a picture of David was refused. She said that Joyce Milgaard wanted her to agree with everything she was saying and talked about all the crimes Fisher had been involved in and "that they were all native victims".³⁷⁹ That was not so.

In Henderson's May 5, 1991 memorandum of the meeting he referred to the fact that Victim 8 had worked for 10 years with the Canadian Justice Department. Henderson wrote "Something about the woman didn't seem right. It was starting to smell like a possible set up".³⁸⁰

He said:

Without identifying the person, we showed her the photo booth strip of (4) Larry Fisher pictures. She studied the photos and commented, "his hair was longer". It should be noted that Fisher was uncharacteristically well groomed in these photos and that all the other rape victims described his hair as being long.

...

She is also a pathetic figure – seemingly far too simple to be part of any government conspiracy against David Milgaard.³⁸¹

Victim 8 did not give a statement, but Henderson and Joyce Milgaard wrote their own summaries of what she said. The summaries differed one from another and contrasted significantly from what Victim 8 had told the RCMP in 1968 and later to Pearson in 1991.

In 1991, she provided a description of her assailant which was consistent with her 1968 RCMP interview but significantly different than that recorded by Henderson. Victim 8 told Pearson her assailant was white, 5'6" or 5'7", with small hands – not "a working man's hands",³⁸² and a slim build.

Henderson's version was:

Victim 8 described the assailant as being part Indian (which Larry Fisher is) and wearing a red headband (which Fisher did) as well as wearing work clothes and boots (which Fisher always wore). The 4 year old daughter claimed that he drove off in a red truck. We believe that the company trucks Fisher would have had access to also were red. More importantly, Jake Kettler, the company foreman Fisher worked directly under, told Joyce that he believed the company had a construction contract at the Potash Mine near Esterhazy at about the same time. Fisher could probably have been there.

...

Finally, Victim 8 described the assailant as being slightly taller than herself. She is 5-4. This also fits Larry Fisher.

378	Docid 012058.
379	Docid 012058.
380	Docid 054514.
381	Docid 054514.
382	Docid 012058.

Information provided by Victim 8 would appear to have eliminated David Milgaard. Most significant: he's not a native Canadian. Also, at the time of this attack he was only 15 and had no vehicle or even a driver's license.³⁸³

Joyce Milgaard noted that Victim 8's anxiety in 1991 about the attack worsened after reading about the Milgaard case and she considered "the possibility that he was innocent."³⁸⁴ She wrote that Victim 8 looked at Fisher's picture and said "it could be him",³⁸⁵ but she especially remembered his hair longer, dirtier and not so clean cut as in the picture. According to Joyce Milgaard, Victim 8 described the assailant as slightly taller than her, maybe 5'5", and part native. Victim 8 herself was Cree and so was quite certain on this point. Her attacker wore work clothes and work boots.

The suggestion that Fisher assaulted Victim 8 was completely without merit. Victim 8 never said so nor was there any evidence that Fisher was in the vicinity at the time of the assault, yet the Victim 8 attack was included in the second s. 690 application as similar fact evidence supporting the contention that Fisher killed Miller.

The RCMP quickly concluded that Fisher had nothing to do with this assault, but its inclusion in the application caused authorities to have continuing doubts about the credibility of information being provided by Joyce Milgaard and Henderson. Williams told the Commission that the inclusion of the Victim 8 assault in the application also created concerns about the credibility of information Joyce Milgaard and Henderson received from the true Fisher victims.

(b) Missing Saskatoon Police Files

In the weeks that followed the filing of the second application, it was alleged in the media that the Saskatoon Police files relating to the three assaults Fisher committed in Saskatoon in October and November of 1968, and the assault committed in February, 1970, went missing after the application was filed, and that "[s]omebody's tampered with the system".³⁸⁶ Although unfounded, the allegation was widely reported in the media, and fit well with the allegation that the Saskatoon Police framed Milgaard and covered up Fisher's convictions.

The first time anyone searched for the Saskatoon Fisher files after Fisher's 1971 conviction was in 1990, as part of the first application. In July of 1990, Williams contacted the Saskatoon Police requesting their files relating to Fisher's 1968 and 1970 assaults, but was told that the 1968 sexual assault files were not available, and that "[t]he 1968 assaults to which Fisher had pleaded guilty had not been microfilmed before they were destroyed".³⁸⁷ He also learned that "[a] number of older files had been destroyed, as part of their normal file destruction procedure."³⁸⁸ The 1970 assault file was located and sent to him. Williams said that shortly after receiving the information he told Wolch that the 1968 files could not be located and that he disclosed to Wolch the 1970 assault file at the October 1990 meeting.

In spring of 1991, Tom Vanin, a Saskatoon Police officer, offered to help Wolch as a confidential police informant. Vanin's call to Wolch was prompted by contact with Dave Roberts, a reporter for the Globe and Mail who Vanin understood to be working for or giving information to Wolch and Asper. Vanin also

383 Docid 054514.

384 Docid 222275.

385 Docid 222275.

386 Docid 039305.

387 Docid 333594.

388 Docid 333594.

told the Inquiry that he had always believed that Milgaard was innocent, and with the publicity surrounding Milgaard's application he wanted to help. Wolch referred Vanin to Asper, and Vanin and Asper had many conversations after that. At the time, Vanin was upset with then Chief of Police Penkala over a number of personal issues unrelated to the Milgaard matter.

Asper asked Vanin to check around the Saskatoon Police station for any information about Fisher. Over a period of three or four weeks, Vanin asked central records staff to look for any files relating to Larry Fisher, giving them Fisher's name and the names of the four Saskatoon victims. He also testified that he went to a different clerk on each occasion to avoid suspicion. No records were located during his first few visits to central records. However, on his last visit, Vanin claims a clerk provided him with an index card with Fisher's name and five or six file numbers on it, as well as one page of an investigation report with Fisher's name relating to a rape. Vanin told the Inquiry he obtained a photocopy of these two documents and showed them to Henderson. Vanin also testified that he told Asper about the discovery, but did not give him the two documents. Vanin's efforts to locate the Fisher files took place in the spring of 1991, before the filing of the second application.

Vanin told the Inquiry that when the Fisher files could not be located, he concluded that "there must be something wrong"³⁸⁹ because "the files weren't where they should be";³⁹⁰ if they had been signed out to somebody, the sign out sheet should have noted it. However, Vanin testified that nothing he saw or heard when he was looking for the Fisher files suggested that they had just "vanished"³⁹¹ or "gone missing".³⁹² Rather, it appeared to him "that they had been missing for a considerable length of time"³⁹³ and he would certainly have conveyed that information to Asper. Vanin also learned that another officer had looked for the files a number of years earlier, and they had been missing at that time.

Henderson told a different story to the Commission about his dealings with Vanin. He said that Vanin had a copy of the 1970 Fisher assault file which he saw at Vanin's home. Vanin denies this, saying he never had the 1970 Fisher file, or removed it from the police station. Based upon details in the subsequent interview of the victim, there is no doubt that Henderson saw the 1970 assault file but he says that he knew nothing of the Fisher index card or the one page investigation sheet, copies of which Vanin says he showed to him. These documents have never been located in the Saskatoon Police records.

Milgaard's second s. 690 application contained information referring to the internal police source and indicated that a copy of the 1970 assault file had been shown to Henderson. However, the name of the police source had been redacted. The second application also claimed that Fisher's assaults were strikingly similar to Miller's murder and suggested that there were new police reports which had not been considered on the first application.

As part of the federal justice department's investigation of the second application, Williams asked Pearson to contact Saskatoon Police for assistance. Williams wanted the Saskatoon Police to conduct another search for any files relating to Fisher's Saskatoon assaults. He also asked for details of all sexual assault offences investigated by Saskatoon Police in 1968, 1969 and 1970, specifying those where weapons were used. He was looking for contrast between the Fisher assaults and the others.

389	T22209.
390	T22209.
391	T22212.
392	T22212.
393	T22212.

On August 22, 1991, Pearson contacted Inspector John Quinn of the Saskatoon Police for this purpose. Officers and staff were assigned, and they reviewed historical documents and microfiche in Central Records. A report was made to the Chief of Police on August 28, 1991.

In the midst of Quinn's review, one of the central record clerks with whom Vanin had dealt told him that there were a number of inspectors in central records late in the evening looking for missing files. Vanin immediately reported this to Asper, and to Roberts of the Globe and Mail. Vanin told the Inquiry that the files "were not where they should have been"³⁹⁴ and that he had "suspicions that somebody may have deliberately hid the files or did something with them".³⁹⁵

The news article which triggered the "missing files" controversy was published in the Globe and Mail on August 29, 1991:

Files that may have a crucial bearing on whether David Milgaard is guilty of murder have disappeared from the Saskatoon Police Department's computerized records system and an internal investigation is under way. The Globe and Mail has learned.

"Something went on, it's very bizarre, it's something that just shouldn't happen, for every detail like that to vanish," a Saskatchewan police source said. "Somebody's tampered with the system".

For several days, Saskatoon police have been investigating the apparent disappearance of at least four files that involve convicted Saskatchewan serial rapist Larry Fisher, who has been increasingly linked to the Milgaard case.

...

Four Saskatoon police inspectors are now involved in trying to track down the missing files, the police source said. A number of officers have already been questioned, as have civilians involved in the maintenance of the computer system.³⁹⁶

Vanin acknowledged that he was the police source referred to in the article, although he took issue with some of the words in the article attributed to him.

The Globe and Mail's story was published in the StarPhoenix the same day and on August 30, 1991 Milgaard counsel sent a letter to the federal Minister enclosing a copy of the Globe and Mail article stating that the article "is most disturbing"³⁹⁷ and "emphasized the need for a thorough reopening of the case".³⁹⁸

394	T22270.
395	T22272.
396	Docid 039305.
397	Docid 333582.
398	Docid 333582.

On August 30, 1991, the StarPhoenix ran a story:

A10 Local

Friday, August 30, 1991 Saskatoon, Saskatchewan The Star-Phoenix

004592

Vanishing files 'unbelievable': lawyer

By Terry Craig
of The Star-Phoenix

Within days of a private investigator alleging the Saskatoon police department framed David Milgaard for the 1980 murder of Gail Miller, police files on Larry Fisher's brutal attacks on city women have apparently disappeared from the police department.

"This is unbelievable," Milgaard's lawyer, David Asper, said from Winnipeg. "The files did exist prior to Aug. 16."

Sometime between Aug. 16 and this past Tuesday, the files went missing, Asper charged.

This month Asper filed an application to the federal Department of Justice seeking a new trial for Milgaard. Within the application was information taken from city police files on Fisher.

At an Aug. 16 news conference in Toronto, Jim McCloskey, founder of the New Jersey-based Centurion Ministries, blasted the city police, claiming it coerced testimony from witnesses to manufacture a case against Milgaard. The department needed a scapegoat because the murder followed a series of brutal rapes in the city and police had no suspects, McCloskey said.

McCloskey's 18-month investigation points to Fisher as the man responsible for the murder. Fisher was living in Saskatoon at

the time of the murder and in 1971 was convicted for four sexual assaults in Saskatoon. Three of those assaults took place during a four-month period before the Miller murder.

Information in those files may have been "so damning that whoever might bear the brunt has taken the risk so they won't get out," Asper said.

Asper heard rumors late last week the files had gone missing. The Toronto Globe and Mail reported Thursday the files had, in fact, vanished.

City police would not comment on the report. All members of the department have been ordered, by acting police chief Murray Montague, not to comment on the Milgaard case. Former police chief Joe Penkala retired this month and is unavailable for comment. Penkala's replacement, Owen Maguire, was also unavailable.

The Globe reported that four senior officers have been assigned to track down the missing files, which were on microfiche.

Mayor Henry Dayday, chairman of the Saskatoon Police Commission, reacting to the Toronto newspaper report, said there was nothing to suggest the files had been destroyed. He had no comment on the report.

Fellow commissioner Morris Cherneskey said he was concerned that record-keeping in the

department "is not up to snuff." Cherneskey said improvements are obviously necessary to ensure similar incidents are not repeated.

Commissioner Owen Mann had no comment.

The public prosecutions division of Saskatchewan's Department of Justice still possesses its original

files on the Milgaard and Fisher cases, according to a news release from Justice Minister Gary Lane.

While not exact duplicates of the files of the Saskatoon Police department, they are in the same form and as complete as they were when the prosecutions were carried out, the release states.

On the same day in the Winnipeg Free Press:

Asper said he has heard that only Fisher's files are missing, and that there has been no large scale loss of older police files in Saskatoon.

He has his own sources who say the files were in the computer system before Milgaard requested a re-trial August 16, Asper said.⁴⁰⁰

Vanin was shown the August 30 news article at the Inquiry and denied telling Asper that "the files did exist prior to August 16".⁴⁰¹ He would have had no way of knowing that. Rather, he told the Inquiry he thought the Fisher files "had been missing for a considerable length of time".⁴⁰² Vanin had no idea who gave Asper the information referred to in the article.

399	Docid 004592.
400	Docid 039314.
401	T22294.
402	T22212.

The Fisher files did not go "missing" *after* August 16, 1991 as Asper alleged in the media. When asked about his source, Asper told the Inquiry that he did not have an explanation other than to "say it is highly unlikely that I would go anywhere near this territory unless somebody had told me, somebody credible, that the files were there and then weren't there".⁴⁰³ He said that he thought Vanin to be the only person "on the inside who could have provided me with that information",⁴⁰⁴ but he could not recall.

On September 5, 1991, Saskatoon Police responded to the publicity:

During 1990, a representative of the Federal Justice Department requested access to several Saskatoon City Police files. The files concerned were very old and only one from 1970 was located at the time. This file remains in the possession of the Saskatoon City Police.

We recently renewed our search for the remaining files and have since located further material which is being provided to the Federal Department of Justice. A search is continuing for the remainder of the files.

...

We have no reason to suspect that any files have been destroyed or otherwise tampered with and there is no internal investigation of any wrongdoing underway.

...⁴⁰⁵

The "internal investigation"⁴⁰⁶ into the "apparent disappearance of at least four files that involve convicted Saskatchewan serial rapist Larry Fisher",⁴⁰⁷ referenced in Roberts' August 29, 1991 Globe and Mail news article, was in fact the review requested by Williams concerning files which Saskatoon Police had already determined to be unavailable in 1990. The article triggered a controversy about "missing files" which had long been unavailable, and prompted a formal investigation by the Saskatchewan Police Commission.

On September 13, 1991, the Board of Police Commissioners requested the Saskatchewan Police Commission to "enquire into the allegations of tampering with files which were made on August 29, 1991",⁴⁰⁸ referring specifically to the Globe and Mail article.

In the Police Commission's written report of November 29, 1991, Robert Laing, Chairman of the Saskatchewan Police Commission, outlined the allegations:

The Board of Police Commissioners of the City of Saskatoon by a letter dated September 13, 1991 requested the Saskatchewan Police Commission to inquire into allegations which appeared in several newspaper articles that certain files and records with respect to convicted rapist Larry Earl Fisher were missing from the Saskatoon Department record system. The allegations included:

1. That the Larry Fisher files and records had been recently deliberately removed from the system by someone.

403	T27191.
404	T27192.
405	Docid 333596.
406	Docid 039305.
407	Docid 039305.
408	Docid 330778.

2. That Larry Fisher had received unusual treatment in having his guilty plea on three charges of rape and one charge of indecent assault which all originated in Saskatoon disposed of in the City of Regina.
3. That four women who were the victims of the above charges were never advised that their attacker had plead guilty with respect to such charges.

The thrust of the combined allegations was that someone in the Saskatoon City Police Department was out to conceal the existence of Larry Fisher, and his convictions for sexually assaulting four Saskatoon women, which attacks occurred on October 21, 1968, November 13, 1968, November 29, 1968 and February 21, 1970. The concern expressed in the news articles was raised in the context that Larry Fisher was a possible suspect in the murder of Gail Miller in Saskatoon on January 31, 1969, for which murder David Milgaard was convicted on January 31, 1970.⁴⁰⁹

The Police Commission conducted an extensive investigation into the allegations, including a review of police record keeping practices, the microfilming process that began in 1970, the physical move to a new police station in 1976, and the computerization of its record-keeping system in 1981. A team of seven Saskatoon Police employees were devoted to searching for the Fisher files. In the course of their search and microfilm review, part of the 1968 Fisher Victim 1 file was obtained including her statement, two investigation reports and a seized article record. However, no information respecting the other two 1968 Fisher assaults could be located. The police also found the complete 1970 Fisher Victim 4's investigation file, but this file had been previously discovered. Police Commission investigators also interviewed and took statements from a number of police officers and Caldwell, Kujawa and MacKay.

The Police Commission's investigation disclosed that the 1968 Saskatoon Fisher files were not in the Saskatoon Police's record-keeping system on August 16, 1991, other than part of the 1968 Fisher Victim 1 file and the Fisher Victim 4 file which were located on microfiche. The Police Commission also concluded that a "significant number of files"⁴¹⁰ unrelated to Milgaard or Fisher were also missing from the microfilm and physical storage. Although the Commission was unable to explain in detail why the 1968 assault files (other than the partial Fisher Victim 1 file) were not found on microfilm, "there was no evidence uncovered in the course of this investigation that suggests that anyone deliberately attempted to avoid microfilming these files."⁴¹¹ The Commission concluded:

It appears obvious from the significant number of files missing from microfilm that the policy of always maintaining one complete copy of a file in central records was not adhered to. The fact that 1½ of the files ended up on microfilm suggests that administrative handling of the files including a move to new premises is responsible for the fact that the missing files were not microfilmed.⁴¹²

The Commission found that "there is no evidence that anyone has tampered with the computer records of the Saskatoon City Police Department since the same were computerized in 1981."⁴¹³

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410	Docid 330778.
411	Docid 330778.
412	Docid 330778.
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As to police handling of the charges against Larry Fisher:

The fact that Larry Fisher's name does not appear in the computer record system of the Saskatoon City Police Department appears to be due in part to the fact that the Saskatoon City Police Department was not involved in processing the guilty pleas of Mr. Fisher beyond supplying a summary of facts with respect to the offences. It is fair to say that some verbal communication occurred between the Attorney-General's Department and the Saskatoon Police Department on the fact of these guilty pleas as evidence by the knowledge of the investigator who attended in Winnipeg to take Mr. Fisher's statements. However, this person was not the person who had investigated the offences, and it appears no written memorandum was produced internally, or transmitted from the Attorney-General's Department which would "trigger" the retrieval of a file for recording and indexing purposes.

The victims of the offences were not notified of Mr. Fisher's guilty pleas, but neither were the investigators of such offences. There was no fixed policy for notification of victims at the time, but it was a practice for the investigator on the file to notify the victim of the conclusion of the same. Lack of knowledge on the part of investigators involved accounts for the fact that victims were not notified.

The handling of Mr. Fisher's guilty pleas in the City of Regina was a decision made by the Attorney General's Department for routine administrative reasons, and was not a decision made by the Saskatoon City Police Department. This practice was commonplace and was not unusual in any respect. It is to be noted that Mr. Fisher was incarcerated in the Saskatchewan Penitentiary at the time of his guilty pleas, and was never in the custody of the Saskatoon City Police.⁴¹⁴

The Police Commission investigation revealed there was no merit to the media allegations that someone in the Saskatoon Police tried to conceal the existence of Fisher and his convictions for sexually assaulting four Saskatoon women.

(c) Victim 12

On the evening of Gail Miller's murder, Victim 12, a 19 year old University student, contacted the Saskatoon Police to report that she had been assaulted that morning at 7:07 a.m. But for the Miller murder, she would not have reported her own assault. A friend convinced her to do so upon hearing of the murder.

She told the police that she was walking to the bus stop that morning on Avenue H South, approximately seven blocks from where Miller's body was found. She looked at her watch at 7:07 a.m. and then a man approached her and "ran his hands or probably used only one hand up and down my legs".⁴¹⁵ She said she screamed and threw her books down. The assailant disappeared and Victim 12 grabbed her books and walked to her bus stop. She described her assailant as 5'5" or 5'6", heavy build, dark complexion and dark hair.

The Saskatoon Police investigated the assault, could not find the assailant, and concluded that this incident was unrelated to Miller's murder. The assault was minor compared to the murder and happened

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seven blocks away and within minutes of the murder. Police then and since have considered that it was impossible for the same person to have murdered Miller and assaulted Victim 12.

In August, 1991, Victim 12 was living in Toronto. She read a newspaper article on the Milgaard case that included a picture of Larry Fisher whom she claimed she recognized. She then contacted Asper who took her statement and sent a copy to the federal Minister.

The Victim 12 statement did not influence the Minister's decision to refer the matter to the Supreme Court. Fisher later denied assaulting her, and other than Victim 12's identification of him 22 years after the event, there is no evidence that Fisher was her assailant. In fact if he was, he would have had an alibi for Miller's murder.

(d) Brian Mulroney Encounter

On September 6, 1991, Joyce Milgaard met Prime Minister Brian Mulroney who was attending a function at a Winnipeg hotel. She and her supporters were outside "campaigning" Milgaard's cause when she was informed that the Prime Minister wanted to speak with her. She told him that David's mental situation was not good and she was trying to get him transferred to another institution. She also said anything that he could do to help would be appreciated. The Prime Minister complimented Joyce on her efforts and her courage.

While neither testified at the Inquiry, both former Minister of Justice Kim Campbell and former Prime Minister Brian Mulroney mentioned the encounter in their memoirs.

In 1996, Campbell's book entitled "Time and Chance: The Political Memoirs of Canada's First Woman Prime Minister", was published. In Chapter 10, "Doing the Right Thing", she discussed her handling of Milgaard's two s. 690 applications. On the subject of Prime Minister Mulroney's meeting with Joyce Milgaard on September 6, 1991, Campbell complained:

...The PM had blindsided me on one of my most difficult issues. In the eyes of the media, the meeting signalled that the PM was involved. Norman Spector, the PM's chief of staff, called to assure me, somewhat sheepishly, that Mulroney had said nothing to Mrs. Milgaard about the section 690 application but had only agreed to look into her concerns about her son's living conditions in prison.

...

As I told the press, Brian Mulroney was much too good a lawyer to intervene improperly in this matter. He never breathed a word to me about Milgaard, nor did anyone in his office ever attempt to influence my handling of the case.⁴¹⁶

In "The Memoirs of Brian Mulroney", the author provides his version of the September 6, 1991 meeting with Joyce Milgaard:

When I got back to Ottawa, I arranged for a fast review of David Milgaard's medical condition. He was soon transferred to a minimum-security institution. In an exchange of letters with Mrs. Milgaard, I told her, "I too, hope the matter will soon be resolved." I then had Hugh Segal summon Justice Minister Kim Campbell to my parliamentary office in

Chapter 3 Overview of Facts

Centre Block, where, because of the sensitivity of the matter, I met with her alone, although I debriefed Hugh Segal and Gilbert Lavoie immediately after.

"The matter has been reviewed by the department and I have conveyed our decision," she told me.

"Kim," I answered, "that is not acceptable to me. The law provides for a reference to the Supreme Court, and it is my intention to ensure that this case is in fact referred to the Supreme Court."

My tone was firm and my words unequivocal. She understood and changed her tack quickly.

"Prime Minister," she answered, "if this is the case, may I make the announcement myself?"⁴¹⁷

(e) Hypnosis of Nichol John

An issue which challenged Williams and the federal Minister on both applications was the use that could be made of John's May 24, 1969 statement. At the Inquiry, Williams explained that he was convinced that John had seen something relevant to the murder of Gail Miller, and he thought it might be useful to explore whether her memory could be clarified under hypnosis. He arranged for two sessions to determine whether John could "remember events that had been blocked out of her conscious memory".⁴¹⁸ On September 20, 1991, she agreed to be interviewed under hypnosis and the first session was with Dr. Lee Pulos, a psychologist and hypnotist in Vancouver, British Columbia. His instructions were to obtain, if possible, an accurate recall of events in 1969. The September 25, 1991 session with Pulos was recorded in audio and video. After reviewing the tape, Williams was concerned about the procedure used and questioned whether John had in fact been hypnotized. He retained an expert, Dr. Campbell Perry, to review the methodology used by Pulos and to assess the results.

Perry reported to Williams in November 1991 expressing concerns about Pulos' procedure and providing his opinion that John was not hypnotized at any point during the session. John agreed to undergo another session, this time with Orne in Philadelphia.

Williams asked Orne "to interview Ms. Demyen [John] under hypnosis, if necessary, in an attempt to ascertain whether her recall of the events of January 31, 1969 that appeared to have been repressed, may be liberated".⁴¹⁹ On January 10, 1992, John met with Dr. Martin Orne. The hypnosis session was video taped. On January 23, 1992, Orne reported to Williams that "while it was possible to help Ms. Demyen become hypnotized, I do not feel any substantive information emerged."⁴²⁰

In the hypnosis session, Orne asked John to remember her flashback and tell him about it. She responded by saying that the flashback "can't be real".⁴²¹ Whether it was real or not, Orne wanted her to proceed and she went on to recount that she got out of the car and came around the corner. She said she remembered a man kneeling over someone; they were face down and the man had his back to John.

417	Brian Mulroney, <i>Memoirs: 1939 – 1993</i> (Toronto: McClelland and Stewart, 2007).
418	Docid 333657.
419	Docid 334366.
420	Docid 334487.
421	T04580.

The man was straddling the person on the ground and he was stabbing. She did not see his face but just his short jacket which was brown corduroy with a tan fur collar.

The extent to which the Minister could rely on John's May 24, 1969 statement in the s. 690 context, even though that statement was not evidence at trial, presented a difficult issue. In a preliminary draft of the questions to be considered by the Supreme Court on the Reference Case, one was whether there was "any impediment or restriction in law to the consideration I may give to the evidence and information provided by Nichol John, detailed in the Reference Case, concerning the culpability of David Milgaard for the murder of Gail Miller, and to the capacity of Nichol John to remember, confirm or relate the events of January 31, 1969?"⁴²² As well, in a November 2, 1991 memorandum from Williams to MacFarlane, Williams discussed the extent to which the federal Minister could consider the evidence of John:

Under consideration is the feasibility of obtaining the assistance of the Court to provide advice to the Minister relating to certain questions. For example, to what extent can the Minister consider the evidence of Nichol John? In 1969 Ms. John implicated David Milgaard in the slaying of Gail Miller in a sworn statement provided to the Saskatoon police. However, at the preliminary inquiry and at the trial of David Milgaard, Ms. John did not recall the important incriminating portions of that statement. During my interview of Ms. John on November 7, 1989, she experienced a "flashback" that was part of a recurring incident that began after Gail Miller's murder.

In her vision Ms. John saw a man stabbing a woman as he sat astride her prone body. She experienced a feeling of helplessness, and ran away. Over a 22 year period she has had recurrent and distressing dreams and recollections of the event. Ms. John's description of landmarks and the positioning of people in her "flashback" reflect portions of the 1969 statement that she did not recall at trial. In addition it discloses additional matters such as the position of the victim. Ms. John positions the victim in the same surroundings and in the same relative position in which Gail Miller's body was found. Aspects of her behavior suggests that she may be suffering from post traumatic stress disorder, (PTSD).

If Ms. John is suffering from PTSD, is the Minister entitled to take the fact of her PTSD into account in determining the weight to be given her 1969 statement.⁴²³

Williams went on to suggest that Justice obtain John's consent to undergo a psychological assessment, and that a qualified expert be retained to determine whether she was afflicted by PTSD.

Dr. Russel Fleming was retained by the Department and asked "to assess Ms. Demyen [John] to determine whether she is suffering from any emotional or psychiatric disorder that has prevented her from recalling, consciously, the memory of the early morning hours of January 31, 1969."⁴²⁴

Federal Justice lawyers invited submissions from Milgaard counsel on the issue of what use could be made by the federal Minister of John's May 24, 1969 statement, and secondly whether hypnosis could or should be used to assist John in recalling the events of January 31, 1969, and the giving of her May 24, 1969 statement. The federal justice department was actively pursuing hypnosis of John to "retrieve" her lost memory. As well they were looking at whether she suffered post traumatic stress disorder,

422 Docid 333970.

423 Docid 002764.

424 Docid 002192.

Chapter 3 Overview of Facts

possibly explaining why she could not currently recall the events of January 31, 1969. These issues were discussed between federal Justice lawyers and counsel for the Milgaards. Milgaard counsel were also privy to the psychiatric assessment, and were shown a video of John's hypnosis session with Pulos. Milgaard's counsel was invited to put their concerns in writing.

Asper wrote to MacFarlane on November 19, 1991:

While we can totally sympathize with the desire to refresh her memory, our view is that it is being aimed in the wrong direction. If her memory was to be refreshed it should be in the area of the police interrogation and the suggestions that were made to her in order to obtain the false statement.⁴²⁵

The efforts of the investigators were premised on John having seen something on January 31, 1969 and then losing memory of it through some phenomena such as post traumatic stress disorder. She had been unable to recall what she saw until May 24, 1969 when she related it to Roberts and Mackie, only to lose recall again except for some flashbacks. Investigators were also interested in trying to assist John's recollection of her interview with Roberts and the giving of her statement to Mackie, events of which she had little memory.

Fleming examined John on November 13 and 14, 1991 and reported to Williams on November 18, 1991. He raised three possible explanations for the discrepancy between John's May 24th statement and her subsequent evidence at trial. Firstly, the May 24 statement could have been a creative effort on the part of the investigating officers who were attempting to help John with her recollection of events. Secondly, John might purposely and consciously have taken a different position during her evidence at trial, either because of a much closer relationship with Milgaard than had been thought, or because she felt threatened by him. Thirdly, she might have repressed the memory of certain events for psychological reasons. While Fleming found the third explanation to be the most plausible, he cautioned:

This assumes of course, that she observed certain events in the first place and that the recollections recorded in the May 24 statement are true and not themselves the product of suggestion.⁴²⁶

Fleming found that John was not suffering from any significant emotional or psychiatric disorder, but that what she seems to have experienced in the weeks and months following January 31, 1969 could be explained on the basis of powerful psychological defence mechanisms operating to protect her from the memory of whatever she may have witnessed:

Having read the transcript of her evidence, I did not have the feeling of any inconsistencies or attempts to alter crucial facts but rather a more or less complete blockage of memory for certain crucial events if in fact she witnessed them. What also comes through in the transcript is that she was not handled in a particularly sensitive manner by the prosecution or more significantly the trial judge and so the fact that she might have a very legitimate loss of memory did not seem to occur to anyone.⁴²⁷

425 Docid 333998.
426 Docid 031224.
427 Docid 031224.

Asked at the Inquiry what investigators concluded from the examinations and hypnosis sessions, Williams testified that they were satisfied that John did not, or could not provide any additional evidence of what took place on the morning of January 31, 1969, beyond that which had been presented at trial.

Williams told the Commission that he certainly had the view that John had witnessed something on the morning of January 31, 1969. Brown of Saskatchewan Justice wrote to him on December 20, 1991 agreeing that one last effort should be made to get "expert psychiatric help to revive her memory".⁴²⁸

As you noted it may be that the events in question were too long ago and have been buried for so long they can not be brought back at this time. However, one last attempt should be made. I am convinced she saw the murder and can identify the person who committed it. As such her evidence, if it's available, is potentially very powerful.⁴²⁹

(f) Neil Boyd and Kim Rossmo Report

In 1991, Simon Fraser University criminologist Boyd and Vancouver police officer/Ph.D. student Rossmo undertook a review of the Milgaard conviction. Their interest was welcomed by the Milgaard group and quickly publicized through Joyce Milgaard's efforts. Boyd and Rossmo saw themselves as independent and interested only in getting to the bottom of the conviction, but they soon suspected that the original case against Milgaard did not fit.

Arrangements were made for Boyd to meet with the Milgaard group in July, 1991. To his surprise, he was met in Winnipeg by a large group of reporters invited by Joyce Milgaard to publicize his involvement.

Boyd and Rossmo read the original transcripts from the case, but also received additional material including the Centurion Ministries report, and some of the associated documents and witness statements. They were aware of the Minister's decision on Milgaard's first s. 690 application, and had followed some of the media programming surrounding the matter. They did not, however, seek out or ever see the original police or prosecution files relating to the Miller murder.

They told the Inquiry they had no preconceived notion of Milgaard's innocence although Boyd acknowledged comments made by him early in his review concerning reasonable doubt of Milgaard's guilt. It is apparent from his statements at the time that he was in favour of a reopening of the case soon after the review started, although he publicly pronounced their objectivity in July, 1991, noting a fear that some might misinterpret their involvement as agents of the "Asper/Wolch/Milgaard camp". Rossmo emphasized to the Inquiry that their approach was an unbiased one.

Boyd and Rossmo reviewed transcripts and other documents, began interviews in the summer of 1991 and travelled to Saskatoon in September. They interviewed further participants including David Milgaard, Emson, Wilson, Karst, Linda Fisher, Dennis Cadrain, Huff, Ferris, Markesteyn, and Henderson. Attempts were also made to speak with Caldwell, Fisher, John and Albert Cadrain. Periodic meetings with Joyce Milgaard continued as well.

Two interviews conducted by Boyd and Rossmo during their review are particularly noteworthy. They met with Emson in September, 1991, following advice they had received from Ferris. Emson said that his trial testimony regarding the likelihood of a young man such as Milgaard bleeding into his semen was incorrect. He now understood that such an occurrence would have been very unlikely.

428 Docid 002663.

429 Docid 002663.

The Wilson interview was important as well for its explanation of the trial testimony and recantation. The interview was taped and a transcript was provided to the Inquiry. Boyd and Rossmo concluded that Wilson's general recantation was credible although they noted that he could not be believed on several specific points. They judged him to be a weak person who would respond favourably to any suggestions made to him.

They were persuaded by Wilson's explanation that by the time of the trial he was starting to believe that Milgaard had indeed committed the crime which allowed him to justify his lies. He no longer cared about the consequences for Milgaard, and simply wanted to remove himself from the situation, a reasonable explanation according to Boyd and Rossmo, given Wilson's character.

The Wilson interview is significant as well in its contrast to the statement given to Henderson one year prior. Significantly, Wilson was no longer pointing to police manipulation and coercion as the reason behind his original lies, suggesting instead that the police had treated him generally well. He was also willing to blame his own character flaws, noting quite frankly that he really only cared about himself at the time and did not give a "shit"⁴³⁰ about Milgaard. Boyd and Rossmo saw these points as raw admissions by Wilson against his own interests. As such, their view on the credibility of his recantation was strengthened.

In the Boyd and Rossmo interview, Wilson also confirmed that the first time the trio were stuck on the morning of January 31, 1969, David Milgaard did leave the vehicle, albeit for no more than two minutes. The Henderson statement was silent about this. Wilson also informed Boyd and Rossmo that Milgaard was in possession of a knife during their trip to Saskatoon, a point that he had denied in his earlier statement to Henderson.

The Boyd and Rossmo report was completed and released in October, 1991, and was used in support of reopening Milgaard's case.

Noting that the federal Minister had disbelieved Wilson's statement to Henderson in considering the original s. 690 application, Boyd and Rossmo acknowledged that Wilson's claims of police manipulation and pressure were difficult to assess, having commented on other occasions that the police had treated him well.

As to why Wilson might have lied, the authors noted:

According to Ron Wilson, he was simply interested in getting free from police questioning on May 24, 1969, going home, and "getting loaded". He was not forced to implicate David Milgaard, but implicating Milgaard was the easiest way to remove himself from a persistently stressful situation – two months of questioning by police. Wilson was a 17 year old delinquent who would usually place his own interests first. He was involved in drugs and crime until the early Eighties, using and selling heroin and LSD, and for 10 years a member of the Regina motorcycle club, the Apollos.

Ron Wilson sketches a picture of disenfranchised street youth in 1969, on the fringes of the fledgling hippie culture and on the edge of a criminal lifestyle. They were all involved in using illegal drugs. "Friends" were passing acquaintances who you ran into in the park, spent a few days with, and who would then disappear for months. Loyalties and

allegiances were non-existent, the primary concern being only to look out for yourself – survival, “better him than me”.⁴³¹

The report also addressed the question of Fisher as an alternative suspect. Led by Rossmo, a review and analysis of Fisher’s sexual assault history had been conducted and a psychological and geographic profiling undertaken. The authors concluded that based upon their review, Fisher was a very good suspect for the Miller murder, and in any event, a better suspect than Milgaard:

Does this mean that Larry Fisher killed Gail Miller? While he is definitely a good suspect, such similarities are not proof. And at the same time, while the profile of this murder does not fit a 16 year old teenager with no previous history of violence or sex offences and well outside his “comfort zone”, it does not prove David Milgaard’s innocence. Profiling deals with probabilities, not with proof beyond a reasonable doubt. What is more probable here, given all the available evidence, is that Larry Fisher committed this crime, and that David Milgaard did not.⁴³²

The October, 1991 report was submitted by counsel for Milgaard to federal Justice officials by correspondence dated October 24, 1991. It seems not to have influenced the federal officials who likely perceived a lack of objectivity once they became aware that its authors were associated with the Milgaard campaign.

The report, however, was information which might have (as opposed to should have) caused provincial officials or police to reopen the investigation into the death of Gail Miller, and for that reason it has been discussed here.

5. Decision to Refer Case to the Supreme Court

Even before the federal Minister’s decision of November 28, 1991 to refer the matter to the Supreme Court of Canada, there were a number of discussions between federal and provincial lawyers and Milgaard’s counsel about the appropriate wording for the Reference questions.

Federal Justice lawyers at first considered two specific matters: the effect of the John evidence and the Fisher evidence on the issue of whether Milgaard’s conviction constituted a miscarriage of justice.

The Minister wanted advice from the Court on the use of John’s May 24, 1969 statement to police, the flashbacks that she reported experiencing about the events on the morning of January 31, 1969, and the results of hypnosis or other medical evidence relating to her memory.

On the Fisher matter, the Minister sought advice on the relevance of Fisher’s actions to the Milgaard conviction.

Saskatchewan Justice, on the other hand, was of the view that the Reference should be as broad as possible, and that the Court should be allowed to look at any evidence both before and after Milgaard’s conviction that might lead to a conclusion that a miscarriage of justice occurred. Brown testified before the Inquiry that the inclusion of the word “continued” before conviction in the Terms of Reference was added to ensure that the Supreme Court would look at matters that happened after Milgaard’s conviction, in considering whether his “continued conviction” constituted a miscarriage of justice.

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DocId 040497.
DocId 040497.

In the result, on November 28, 1991, the Minister chose a very broad question for the Court, asking for its opinion on whether the continued conviction of David Milgaard constituted a miscarriage of justice based upon the judicial record, and any other evidence it wished to hear.

Part XII – Supreme Court Reference

1. The Scope and Purpose of the Reference

The federal Minister had the option under s. 690 of the *Criminal Code*, to refer Milgaard's second application to the Saskatchewan Court of Appeal for its opinion, on any question on which the federal Minister desired assistance from the Court. The Reference procedure allows the Court to hear evidence, review a documentary record, and provide advice to a federal minister on general or specific questions. More importantly, the Reference procedure allows participation of the applicant in a public and transparent process.

In 1991, Milgaard's trial counsel Tallis was a member of the Saskatchewan Court of Appeal. The federal Minister decided to refer Milgaard's application to the Supreme Court of Canada pursuant to the *Supreme Court Act*.

In hearing the Reference, the Supreme Court did not sit as an appeal court, nor did it render any judgment as if it were hearing an appeal. Their role was limited to giving advice to the federal Minister respecting the exercise of her powers under s. 690. The Court was essentially performing the Minister's function under s. 690, in a judicial and transparent forum, however without any decision making power. The Court did not have the ability, on the Reference, to make any orders affecting Milgaard's conviction.

The questions submitted by the federal Minister to the Supreme Court were:

- "(a) upon a review and consideration of the judicial record, the Reference Case that will be filed before this Court, and such further or other evidence as the Court, in its discretion, may receive and consider, does the continued conviction of David Milgaard in Saskatoon, Saskatchewan for the murder of Gail Miller, in the opinion of the Court, constitute a miscarriage of justice?"
- "(b) depending on the answer to the first question, what remedial action under the *Criminal Code*, if any, is advisable?"⁴³³

David Milgaard, Saskatchewan Justice and the federal Minister were granted status as parties before the Court. Milgaard was entitled to advance his assertion that his conviction constituted a miscarriage of justice. Saskatchewan Justice was directed to defend the conviction, and the federal Minister was to remain neutral and facilitate the process.

Before the hearings commenced, Fisher applied for, and was granted, standing on the basis that the Reference affected his interest because of Milgaard's allegation that Fisher was the real perpetrator.

The Supreme Court told the parties it would consider any evidence or submission related to the issue of whether Milgaard's conviction constituted a miscarriage of justice. The Milgaards were not limited by what had been asserted in their applications to the Minister. The Court did not limit or prevent Milgaard from

tendering evidence or making submissions on any subject or issue relating to a miscarriage of justice, contrary to what his counsel later said. Milgaard was not prevented from leading evidence on, and making submissions respecting, police misconduct, or their widely publicized claims that Milgaard was framed and the Fisher convictions covered up. Had these allegations been established, Milgaard's continued conviction would undoubtedly have been viewed as a miscarriage of justice.

In opening remarks, Chief Justice Lamer stated that the Reference "is not a trial; this is not a rehearing of an appeal; nor is it a Royal Commission of Inquiry into certain matters."⁴³⁴ He said that neither Milgaard nor Fisher were on trial at the Reference.

In his opening submission to the Court, counsel for the Minister defined the role of the Court in the Reference:

You are simply requested to determine whether there was a miscarriage of justice. Because this is a reference, because it arises as a result of an application for mercy and because of the way the questions were framed, I believe all counsel here agree that you are not constrained by the normal rules of evidence or procedure and can entertain and consider anything which common sense and logic suggest is relevant. You are thus as free as the Minister would be when entertaining an application for mercy.⁴³⁵

The parties were allowed to file any relevant documents they wished the Court to consider. Evidentiary rules were relaxed, and the Court received any evidence or information that a federal minister could under s. 690. Twenty-five volumes of materials were filed by the parties, including police reports from the Miller investigation file, the Crown prosecutor's file, and information relating to Fisher's assaults.

The Court indicated that witnesses would be "the court's witnesses",⁴³⁶ although the parties were able to request that any relevant witness be called. The onus lay on Milgaard to call whatever witnesses he wished to establish a miscarriage of justice. Saskatchewan Justice viewed its role as testing the evidence advanced by the Milgaards, and calling evidence in response. They were not expected to prove anything, the Reference not being a retrial of Milgaard. Rather, they were to ensure that the Court had a complete and tested record of evidence, to inform the question posed by the federal Minister.

Brown told the Commission that he had concerns with Saskatchewan Justice being directed to assume an adversarial position with Milgaard at the Reference hearing. Saskatchewan Justice was not involved in the adjudication of the first application. The second application was filed because the Milgaards were not satisfied with the federal Minister's decision on the first application. The Milgaards were really taking issue with the federal Minister, yet Saskatchewan Justice was directed to be their adversary:

Well, I had a concern about the Attorney General of Saskatchewan being involved in the Supreme Court at all simply because we were part of what was being investigated. There had been allegations by the Milgaards that there had been cover-up and essentially corruption within the Department of Justice in Saskatchewan and it seemed to me that the more appropriate way to go after that was via somebody independent inquiring into it and not us being involved in the hearings, but I was overruled on that.

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434 DocId 208523.
435 DocId 208523.
436 T39772; and DocId 115797.

- Q Did you have concerns about the position it would put the Saskatchewan Attorney General in in the eyes of the public given what had gone on before, or had preceded this?
- A Well, yes, I mean, that was my concern, is that there had been allegations of misconduct by people who had been with Saskatchewan Justice and now you have Saskatchewan Justice essentially going to court to argue their case and say no, no, there was no problem there. It should have been – in my view it should have been a more neutral kind of matter.⁴³⁷

Although adverse to Milgaard at the Reference, Brown said that had he concluded at any point that there was a basis for finding a miscarriage of justice he would have informed the Court. He was still representing the Attorney General of Saskatchewan, and if information was received that caused him to question the safety of the verdict, he would have said so.

Prior to the hearing, the parties agreed to disclose relevant documents. Saskatchewan Justice delivered to Milgaard's counsel the entire Saskatoon Police Miller investigation file, and the Crown prosecutor's file. The Inquiry learned that in 1993, as part of the RCMP investigation into wrongdoing, Saskatchewan Justice had located copies of three RCMP reports prepared in 1969 as part of their investigative work on the Miller murder. The RCMP had destroyed their own copies of these reports many years earlier as part of normal file destruction, but Saskatchewan had earlier received copies as part of the RCMP reporting requirements for its contract policing with the Province. They had not been filed with the Milgaard investigation files, and Saskatchewan Justice was unaware that they had them at the time of the Reference, so they were not disclosed.

The Milgaards did not disclose the transcripts or tapes from the 1981 to 1983 interviews conducted by Joyce Milgaard and Carlyle-Gordge. These included the early interviews of Wilson, John, Cadrain and the motel room witnesses. They also did not disclose the transcript of the October 1991 interview of Wilson conducted by Boyd and Rossmo.

Federal Justice disclosed its investigation documents but not any of its reporting or advice documents, over which it claimed solicitor/client privilege. Among these were Williams' report to the Minister, and anything related to the retention of McIntyre and his opinion to the federal Minister.

The Supreme Court had broad discretion regarding the information and evidence it would consider in the Reference process. It decided to hear witnesses and consider the documentary record. The Reference process was completed in less than five months. The Reference was ordered on November 28, 1991 with hearings commencing on January 16, 1992 and concluding on April 6, 1992. The opinion was handed down on April 14, 1992.

2. Test to be Applied by the Court

After the hearings commenced, the Supreme Court invited submissions from the parties on the appropriate test to be applied by the Court in determining a miscarriage of justice. On February 28, 1992, the Court issued the guidelines that it would apply, stating that the continued conviction of David Milgaard would constitute a miscarriage of justice if:

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1. the Court is satisfied beyond a reasonable doubt that Milgaard is innocent of the murder of Gail Miller.
2. the Court is satisfied on a preponderance of the evidence (probably or more likely than not) that Milgaard is innocent of the murder.
3. there is new evidence put before the Court which is relevant to the issue of Milgaard's guilt, which is reasonably capable of belief and which, taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict.

The Court added that if the evidence failed to establish a miscarriage of justice it might nonetheless consider advising the Minister to grant a conditional pardon where, having regard to all the circumstances, it was felt some sympathetic consideration of Milgaard's current situation was in order.

3. The Supreme Court Hearings

The Reference commenced on January 16, 1992 and the first witness, David Milgaard, testified on January 21, 1992. Hearings began only six weeks after the Minister's request. During this time period, significant volumes of documents were disclosed and preparations for the hearings were made under very tight deadlines. The Milgaards had frequently complained about the delay in the s. 690 process and the early hearing date was set in response to their desire to have this matter heard as quickly as possible. Other than what was provided at the October 1, 1990 meeting, Milgaard counsel had not seen the Saskatoon Police file, nor the Crown prosecutor file. Disclosure of all of this new information put a significant burden on their preparations. The Court was prepared to delay the Reference hearings, but Milgaard's counsel wished to proceed.

In the first and second applications, Asper had done most of the work, with input and overall supervision from Wolch. Once the Reference was ordered, Asper told the Inquiry Wolch assumed conduct of the file, deciding what witnesses to call or not call and examining them at the hearings. Asper said they had very little time to brief Wolch.

The hearings were open to the public and received extensive media coverage.

Twenty-two witnesses testified over 15 days:

- David Milgaard
- Ron Wilson, Nichol John, Albert Cadrain (Travelling companions)
- Eddie Karst, Art Roberts (Police Officers who dealt with these witnesses)
- Dr. Fleming (interviewed Nichol John in 1991)
- Deborah Hall, Ute Frank, Craig Melnyk, George Lapchuk, Luana Edwards (relating to credibility of Lapchuk) , Bobbie Stadnyk (relating to credibility of Edwards) (Motel room incident witnesses)
- Calvin Tallis (Trial counsel)
- Ben Dozenko and Jack Hewitt (Milgaard's prison guards)

- Larry Fisher, Linda Fisher, Fisher Victim 7, Victim 12, Brett Morgan (jail house informant re Larry Fisher), John Patterson (jail house informant) (Larry Fisher evidence)

During the Reference hearings Saskatchewan Justice demanded that Milgaard undergo a secretor test. He was tested and determined to be a secretor. As a result, Ferris and Markesteyn did not testify but their reports were filed.

Neither Caldwell nor Kujawa were called as witnesses. This was noted by Saskatchewan Justice to be significant in light of Milgaard's numerous allegations of Crown misconduct relating to disclosure at trial, the handling of Fisher's 1971 convictions and the alleged cover-up. Caldwell travelled to Ottawa and was prepared to testify but was not called by Wolch. Brown said Saskatchewan Justice had no reason to call Caldwell or Kujawa, there being no evidence suggesting that either of them had done anything to contribute to a miscarriage of justice. Had he wished, Wolch could have called them.

4. Review of Evidence

(a) David Milgaard

The Court wanted to hear David Milgaard first. He had not testified at trial, so both Saskatchewan and the Court wanted to hear him say that he was innocent, to provide his version of what happened on January 31, 1969, and respond to the evidence presented at his trial.

Milgaard had been in jail for 23 years. He suffered from a number of psychological problems while in prison and according to Asper and his mother was not mentally stable when he testified. He was in a very fragile emotional state. While in prison he suffered from mental illness and experienced a number of difficulties. Asper told the Commission:

David was susceptible to losing his lucidity and he was susceptible to periods of being out of touch with reality, and there had been an enormous amount of stress in the weeks and months pre – immediately preceding the Supreme Court Hearing and he had been, let's say, up and down in the – in the – in that period leading up to the hearing, and we were concerned about his ability to hold it all together.⁴³⁸

Milgaard was extremely agitated and concerned with the whole Supreme Court Reference process. He believed, based upon what he had been told, that the Ferris report proved his innocence and so saw no need to testify, believing that the report should have sufficed.

Milgaard was on medication at the time. He told the Inquiry that he had been misdiagnosed with problems because people thought he was guilty; had been sent to mental institutions and given medication that clouded his mind, and that he was completely mixed up. He said that he would review things in his mind knowing he was not guilty and "this would mix up my memory".⁴³⁹ His best recollection, he said, was in 1969 and 1970 and that over the years his memory became less reliable and more susceptible to reconstruction and influence.

He explained that his years in prison going over the events of January 31, 1969, in an attempt to find what had led to his wrongful conviction, together with many discussions with his mother and legal counsel trying to understand how to get the conviction overturned made it difficult to distinguish real memory from

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reconstructed memory. The only thing he knew for certain was that he did not kill Gail Miller. Over time, he began to deny any evidence that tended to incriminate him.

He said his best and most reliable recollections were told to his lawyer Tallis in 1969. Tallis had spent considerable time with him preparing for the trial, and probed his recollection of critical events.

Wolch did not have detailed discussions with Tallis until just prior to the hearings. Then he learned, for the first time, what Milgaard had said to his counsel in 1969. It differed in key respects from Milgaard's 1986 affidavit, and what he and his advocates had been saying publicly.

Before he even testified, Milgaard was in a predicament. He had made statements in the media denying some of the evidence tendered at his trial. In his 1986 affidavit he swore under oath that he did not throw a compact out of the car, and that the motel room incident did not happen. Some aspects of his first application to the Minister and the positions taken by him and on his behalf in the media were contradicted by what he told Tallis in 1969.

Milgaard, his mother and his counsel had made many public statements that police coerced Wilson to give false evidence, and that all of Wilson's incriminating trial evidence was false. They denied that David was apart from Wilson, that David had a knife, and that David threw out a compact. Their public position had been that the first statements given by Milgaard, Wilson and John were the complete story and the truth, and that later statements were the product of police coercion.

Tallis told Wolch that in 1969, David admitted throwing out the compact, that he could not deny the motel room incident, that he had a knife on the trip to Saskatoon, that their vehicle got stuck after stopping a lady for directions and that David and Wilson were apart after leaving the stuck vehicle.

Joyce Milgaard and Wolch decided not to tell David what they learned from Tallis, his mother fearing that the information might throw him off in his "fragile"⁴⁴⁰ state. In hindsight, had David Milgaard testified in conformity to what he told his counsel in 1969, he would not have found himself contradicted on significant matters by Tallis and other witnesses including the "recanting" witness, Wilson.

Wolch led the examination of Milgaard who told the Court that he did not kill Gail Miller. Wolch then went through some of the evidence that had been led against Milgaard at trial. Milgaard swore that:

1. "I never ever threw any compact out of the window of the car".⁴⁴¹
2. With respect to Melnyk and Lapchuk's trial evidence about the motel room incident, "none of it was true".⁴⁴²
3. "There was never any knives in our car until after we left Saskatoon".⁴⁴³ Milgaard denied having any knife including a bone handled hunting knife. He said if Wilson said there was a bone handled hunting knife in the car Wilson is wrong.
4. Milgaard testified that their vehicle did not get stuck before they arrived at the Danchuk house. He specifically denied getting stuck and leaving the car to look for help.

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Milgaard surprised everyone, including his own counsel, when he testified that upon their arrival in Saskatoon on the morning of January 31, 1969, they stopped to get the heater fixed at a garage around 7:00 a.m. where Milgaard bought some chicken soup in a packet.

This was alibi evidence. He added that he remembered trying to get Tallis to find the "chicken soup man",⁴⁴⁴ but he never did. This incident had not been mentioned by Wilson, John or Tallis, and they denied it in their evidence. Brown said that he thought it was an "out and out lie",⁴⁴⁵ and a "deliberate untruth"⁴⁴⁶ and an effort to manufacture an alibi.

(b) Ron Wilson

Wilson testified immediately after Milgaard who had been relying on Wilson's recantation of his trial evidence to support his application. In the end, his evidence did not assist.

Counsel for Saskatchewan Justice, Eric Neufeld questioned Wilson first, and his testimony followed substantially his recantation given to Henderson in June 1990. However, Wilson contradicted Milgaard's earlier evidence in two significant respects. He testified that Milgaard had a bone handled hunting knife in his possession on the trip from Regina to Saskatoon. Milgaard had denied this the day before. Wilson also testified that after they stopped a woman for directions in Saskatoon, their vehicle became stuck, and that he and David left the vehicle in opposite directions looking for help. Wilson said that he walked approximately four or five blocks and returned to the car with David returning not long after. Wilson estimated that he was away about 10 minutes. The day before, Milgaard had testified that their vehicle was not stuck, and that he did not leave the car or Wilson that morning. At trial, the Crown had argued that Milgaard murdered Miller when he was away from the car looking for help.

Wilson also acknowledged some significant omissions in his March 3, 1969 statement to the RCMP when he failed to mention that they stopped a woman for directions, got stuck, that he was apart from Milgaard for 10 minutes and that Milgaard had a knife.

At the conclusion of Wilson's examination by counsel for Saskatchewan Justice, Chief Justice Lamer made the following remarks to Wilson:

Lamer, CJ: You have told us that when you testified against Mr. Milgaard you believed that he was guilty.

Wilson: Yes sir.

Lamer, CJ: I see. You also told us today that when you gave your statement, the last one, that actually now you believe that he is innocent.

The witness: Yes sir.

Lamer, CJ: We all know that if we believe your testimony believing him guilty you said things that didn't happen.

The witness: Yes sir.

444 Docid 120643.
445 T37764.
446 T37764.

Lamer, CJ: And that resulted in a conviction.

The witness: Yes sir.

Lamer, CJ: I put this to you: You must be very careful what you tell us because of course if you are caught lying – we are talking of something material – it will reflect throughout. It will have a ripple effect over all of your testimony today. So I'm putting to you now believing that he is innocent: are there things that you think you might say different just because you might want to help him? And it wouldn't help him. It would be very damaging.

I am putting to you before you are to be further questioned: is there anything you want to think over in your testimony that you might – maybe with the temptation of doing the right thing, as you thought doing the right thing at the time.

The witness: No sir everything is fine.

Lamer, CJ: There is nothing?

The witness: Everything is fine.

Lamer, CJ: You are sure?

The witness: Yes sir.

Lamer, CJ: You will not have any oversight?

The witness: I don't believe so.⁴⁴⁷

Wolch questioned Wilson next. Wilson had contradicted Milgaard on two key points, the knife and Milgaard leaving the car when they became stuck. Wolch decided to challenge Wilson's evidence on these two points, risking the consequences of impeaching the credibility of a witness who was otherwise providing favourable testimony.

Wolch suggested to Wilson that the police had "planted"⁴⁴⁸ in his mind the 15 minute period of time when he and Milgaard were apart, referring to Wilson's trial evidence on the point. Wilson had just told the Court it was only 10 minutes. Justice Sopinka intervened, asking Wolch to ask Wilson what his evidence was regarding the length of time Milgaard was absent from the car when they got stuck. Wolch answered "It is our position they were never stuck. That is what I want to get to. I would like to question him to get to that point. And I will show you why it is correct".⁴⁴⁹

Wolch then read to Wilson a number of police reports setting out his argument why he thought the vehicle was never stuck, and therefore he and Milgaard were never apart. This line of questioning was premised on Wolch's theory that Wilson's March 3 statement was the complete truth, and that everything Wilson added later was false.

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Wilson's May 23, 1969 statement to the police mentioned that Milgaard left the vehicle when it was stuck, but was silent about Wilson leaving the vehicle. The next morning, Wilson gave a second statement saying that he had left the car as well as Milgaard. Then, on the 24th, John gave her statement claiming to have witnessed Milgaard grab Miller and stab her after he left the vehicle.

Wolch suggested to Wilson that his second statement was needed to match John's. Wolch told Wilson:

"The problem at that point is that you have said you are in the car, or haven't left the car. And if you are there and Nichol was there, you would have had to have seen it, if Nichol was telling the truth...

So the police came back to you and told you that you couldn't have been there.

...

That is why you changed it ...

you now have to invent something better, so what you invented, with a little bit of guidance, was: I left the car and I came back and she was hysterical isn't that correct. Because sir the simple truth is that it never happened?"⁴⁵⁰

Wilson responded yes to everything Wolch said to him. Wolch concluded: "You lied yesterday, you lied this morning. The fact is it never happened?" Wilson responded: "I believe you are right".⁴⁵¹

At the conclusion of this exchange, Lamer, CJ intervened:

Lamer, CJ: If we add up the time on the bench and the time we spent in court rooms, I have never seen an interrogation carried on in this way around my way. But we cover pretty much the country here. You must put questions. That is an argument. All of these statements --

Mr. Wolch: My Lord, this witness is admitting he lied.

Lamer, CJ: Well, of course. He has lied through his teeth all along. He lied to me today. I asked him specifically that question before leaving: Now you think of this. And when I came back, he said: there is nothing.

Mr. Wolch: My Lord, my point is: David Milgaard testified in this Court that this didn't happen. He is now saying it finally.

Lamer, CJ: That is fine, he said it and --

Mr. Wolch: I don't want to leave him with leaving the car, because it is a lie.

Lamer, CJ: Well, of course. But put questions to him instead of arguing why he lied. You can ask him: Why didn't you tell the truth to the Chief Justice when he asked you at the adjournment, and things like that. But I don't think that even if you are leading questions -- you are entitled to lead and I think you have lead quite a bit. But you must give the witness some autonomy.

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DocId 013632.
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I am expressing the feeling of all of the Members of the Bench. It is not just myself. We all feel that it is a rather unusual way to proceed.

I am not disappointed in any of the questions. That is not the point. The point is that if you get away with that, why wouldn't we have to let the others get away with that?⁴⁵²

Wolch then asked, "Mr. Wilson, when the Chief Justice asked you if you wanted to correct your evidence, did you contemplate correcting this?"⁴⁵³ Wilson replied: "No, I didn't because you just brought it out to me that that is the way it was."⁴⁵⁴

Lamer C.J. then told Wilson "You have lied to us yesterday. You have lied in recanting. You have lied the recant."⁴⁵⁵ At the conclusion of his evidence, Chief Justice Lamer cited Wilson for contempt of court with regard to his contradictory testimony on the question of their vehicle being stuck and he and Milgaard being apart.

Wilson returned to Court a few weeks later with counsel to answer the citation for contempt. Wilson explained his contradictory evidence saying that he was "absolutely positive that the answers to Mr. Neufeld were correct".⁴⁵⁶ Wilson confirmed that their vehicle was stuck and that he and Milgaard left the car and were apart for 10 minutes. He said his answers to Mr. Wolch on this subject were false.

Wilson explained his "lies"⁴⁵⁷ to Wolch saying that throughout the proceedings he believed he was "on the side of David Milgaard and his lawyers"⁴⁵⁸ and "on the same team"⁴⁵⁹ as Wolch.

Wilson's counsel asked him:

Q: I gather from reading the transcript that it would be fair to say that, through the questioning by Mr. Wolch, you were asked to read, to listen to him, to analyze some differences in what was in the statements, and to answer all at the same time.

A: Yes I was.

Q: Were you trying to follow Mr. Wolch when you were giving him the answers?

A: Yes, I was trying to. Yes

Q: Did you think at the time that you were following all of his arguments?

A: I thought I was.

Q: And you still thought that Mr. Wolch was on your side as you go through that?

A: Yes.⁴⁶⁰

452	DocId 013632.
453	DocId 013632.
454	DocId 013632.
455	DocId 013632.
456	DocId 121235.
457	DocId 121235.
458	DocId 121235.
459	DocId 121235.
460	DocId 121235.

Chief Justice Lamer asked Wilson:

Could it be that you are answering "Yes" to everything that sounded like he [Wolch] wanted a "Yes" and you are answering "No" to everything he seemed to be indicating he would want a "No".⁴⁶¹

Wilson agreed.

After Watson completed his questions, Mr. Justice Sopinka asked Wilson about the "substantial departure"⁴⁶² in the evidence he gave to Eric Neufeld and the evidence he gave to Wolch regarding Milgaard's possession of a knife. Wilson had admitted to Neufeld that he saw a hunting knife on Milgaard on the trip to Saskatoon, but when examined by Wolch he said it never happened. Wilson confirmed that the evidence he gave to Neufeld was true.

Wilson's admission that he lied before the Supreme Court, and his explanation for having done it were devastating to the credibility of his recantation. He admitted that he lied under oath when questioned by Milgaard's lawyer because he thought he was on "Milgaard's team". Saskatchewan Justice later argued that the credibility of Wilson's recantation to Milgaard's investigator was suspect.

(c) Mr. Justice Calvin Tallis

It was not clear at first whether Tallis would be a witness, but after Milgaard's testimony, particularly about the chicken soup/heater stop, his testimony in response was needed.

Tallis' testimony contradicted Milgaard's evidence on a number of significant points relating to things that Milgaard had admitted to him in 1969:

1. he had a knife in his possession on the way to Saskatoon (not a hunting knife nor a maroon handled paring knife);
2. they stopped a lady for directions and Milgaard thought about robbing her;
3. shortly after, their vehicle became stuck and he and Wilson left the vehicle in separate directions looking for help;
4. that when he returned, two men in a cream colored Chrysler came along and pushed them out;
5. he threw a compact out of their vehicle on their way out of Saskatoon explaining he was not sure where it came from or why he threw it out; and
6. the motel room incident may have happened and he couldn't deny it.

Tallis further testified that Milgaard had never told him about stopping to get the car heater fixed or about buying chicken soup at the garage and denied that his client had asked him to check out this alibi.

(d) Nichol John

At the Supreme Court, John was asked about her recollection of events on the morning of January 31, 1969. While there was much she did not remember, she recalled that they stopped a woman on the street and that their vehicle got stuck in the approach of an alley with a church at the end of the alley. She also recalled being outside of the car, while it was daylight, and also being in a house. She recalled that they drove to a motel and that David went into the motel to get a map. She recalled leaving Saskatoon and

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passing through Rosetown. She remembered finding a cosmetic bag in the glove compartment of the vehicle. She recalled that the cosmetic bag was thrown out but she could not recall by who. She only vaguely recalled being in Calgary and then returning to Regina.

John confirmed that she experienced flashbacks of being in the car in an alley, facing the church. She could see garbage cans to her left. She recalled sitting in the back seat of the car alone. She said that she heard church bells which drew her attention and that she sat up. She saw a garage and a fence and said that she felt like she was standing outside. Asked if anything else was associated with this memory, she said "I can't tell you, because I'm not sure. I don't know my mind."⁴⁶³ She also said "there's a picture in my head and I don't know where this picture is from".⁴⁶⁴ She then went on to describe a picture of someone on the ground and "there is someone else straddled over them going like this".⁴⁶⁵ She could not see the face of the person but recalled seeing a brown coat. She recalled that there was snow on the ground and it was just starting to get light. She indicated that these flashbacks occurred often and started after the trip she took with Milgaard and Wilson to Saskatoon.

John was asked about her May 24, 1969 statement to Saskatoon Police. She recalled being picked up by the police in Regina and driven to Saskatoon. She confirmed her signature on the May 24, 1969 statement. She remembered being driven to the police station and going upstairs. She recalled being in a room and talking to someone. She also remembered driving around Saskatoon with the police. She did not recall spending the night in police cells but did remember being really upset. She recalled that someone brought her a glass of water and an aspirin. She also recalled being in a hotel room with Wilson. She did not recall a man by the name of Art Roberts. She remembered telling Wilson that she wanted to take a lie detector test but that they would not give her one. She believes that she gave her statement sometime after being driven around by police but her recall of the sequence of events was poor. She stated that she did not think that the police treated her badly nor did she believe that she had lied to them or to the court.

John was asked if she remembered talking with Wilson and agreeing with him to convict David Milgaard of murder. She answered:

I remember a conversation something along those lines, but I don't know what the words were.⁴⁶⁶

When asked if the conversation included any indication that she was to lie, she responded "I don't know".⁴⁶⁷ She believed that the conversation with Wilson probably took place in the hotel room and occurred around the statement taking time.

On cross-examination by Wolch, John confirmed that she remembered being really upset when she was with the police but she did not provide any further information. When asked if, as a scared 16 year old, she might have followed Wilson's advice to sink Milgaard, she replied "I might have, yes".⁴⁶⁸ Although Wolch provided John with her March 11 and May 24, 1969 statements to police which he stated were in conflict, she was not asked to explain the inconsistencies.

463	DocId 302469.
464	DocId 302469.
465	DocId 302469.
466	DocId 302469.
467	DocId 302469.
468	DocId 302469.

(e) Dr. Russel Fleming

Fleming is a psychiatrist who examined John, at the request of federal Justice on November 13 and 14, 1991. His report to Williams was dated November 18, 1991.

On February 18, 1992, Fleming gave evidence about the John interview and about psychiatric problems possibly affecting her ability to recall events of January 31, 1969. Fleming gave some possible explanations for John's behavior and discussed her May 24, 1969 statement to police. He could not be conclusive.

Fleming gave post traumatic stress disorder as one possible explanation for John's behavior. He said that "in the absence of evidence that would support the other possibilities, I ended up believing that she had, in fact, repressed certain memories, if in fact those memories were originally present at all, which is not absolutely certain".⁴⁶⁹ The other possibilities referred to were that John consciously fabricated something, or that she was pressured or encouraged to provide a statement which she signed and which she became convinced was true in May, 1969, but then did not subsequently support at the time of the preliminary and the trial. Fleming's feeling based on the material he reviewed, was that John had tried to tell the trial Court what she could remember, but the Court failed to understand that she was not simply lying but could not remember certain events.

When cross-examined by Wolch, Fleming acknowledged that amongst the possible things that might explain her May 24, 1969 statement, were deliberate lies or the adoption of information suggested to her by police. He agreed that being shown the coat of the victim and photographs might have had a profound effect on her. Her flashbacks might not in fact have been memories of a real image at all, but rather the product of her imagination:

The flashbacks don't actually have to be real memories. They could be the product of imagination as well. I don't think that has actually been ruled out one way or the other.⁴⁷⁰

On questioning by the Court, Fleming agreed it was possible that John was lying, or that she was suffering from a repressive symptom. He said that "to believe that the repression theory is an issue here at all, you have to first of all go from the premise that she actually did observe events".⁴⁷¹ Although he was not able to say conclusively that John suffered from post-traumatic stress disorder or psychogenic amnesia, he felt that the likelihood of a psychological repressive mechanism operating, was as strong as the evidence supporting any of the other ways of explaining her behaviour.

(f) Albert Cadrain

Cadrain testified that he told the truth in his March 2, 1969 statement to the police, and that he had seen blood on Milgaard's clothing on the morning of Miller's murder. He said that Milgaard threw his blood-stained pants into the garbage truck on the morning of the murder. He confirmed telling the truth at David Milgaard's preliminary hearing and trial, and said that he had gone into psychiatric care after the trial. Wolch cross-examined Cadrain on a number of issues including his treatment by the police in 1969, and his mental health.

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470	Docid 014390.
471	Docid 014390.

(g) Motel Room Evidence

The Supreme Court heard from all of the motel room incident participants. Lapchuk and Melnyk both confirmed the truth of their trial evidence. Hall acknowledged that the incident took place and confirmed the evidence she gave to Williams in November of 1989 regarding the words spoken by Milgaard. She said that she viewed Milgaard's comments as being crude and sarcastic, treating them as a joke.

Frank testified that an incident took place in the motel room, but she described it somewhat differently than the others. She confirmed that she saw Milgaard "stabbing the pillow"⁴⁷² and heard him say "he had killed her"⁴⁷³ several times. She did not find the incident a joke and took it seriously. The Court also had an affidavit from Harris who said he was present in the motel room. He did not deny the incident took place but said that whatever David said was not serious.

(h) Police Evidence

David Milgaard testified that the Wilson and John statements were the result of police coercion and that is why they lied. The theory of police misconduct, manipulation and coercion of witnesses was an argument advanced by Milgaard's counsel before the Supreme Court. Wilson, John and Cadrain were questioned regarding their treatment by police. Police officers Karst and Roberts also testified regarding their dealings with these witnesses.

During the course of the Reference, Wolch discovered in the documents disclosed by Saskatchewan Justice a five page document which the Commission referred to in its hearings as the Mackie Summary. The first four pages represented a summary of evidence the police had collected together with one page of theories. He argued at the Supreme Court that the summary, which at that time he thought was Caldwell's, was used by authorities to coerce the witnesses to lie.

(i) Eddie Karst

Karst first interviewed Cadrain and Milgaard and later Wilson and John. He took Wilson's incriminating statements of May 23 and 24, 1969. Karst travelled to Winnipeg in October 1970 to take Fisher's statement admitting to two of the Saskatoon sexual assaults.

Karst was questioned by counsel for Saskatchewan Justice and by Wolch about all his interactions with the witnesses. He testified that he had nothing to do with Roberts' polygraph examination of Wilson but became aware of the results. Karst believed that Wilson's incriminating evidence given on May 23 and 24, 1969 was confirmed as being truthful by Roberts' polygraph of Wilson.

Wolch cross-examined Karst on his dealings with the Milgaard witnesses before trial, and with Fisher in 1970. He showed Karst the "Mackie Summary" and questioned him about whether this document was used as a script by the police to coerce witnesses to fabricate evidence. Karst had never seen the document before and denied any inappropriate conduct with the Milgaard witnesses.

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(j) Inspector Art Roberts

Roberts was the polygraph operator who interviewed Wilson and John on May 23, 1969. He was questioned by counsel for Saskatchewan Justice, cross-examined by Wolch and finally questioned by the Court.

Roberts was 72, having retired from the Calgary Police force in 1975 after 35 years of service. He died in 1997 leaving his Supreme Court testimony as the only sworn record of his dealings with Wilson and John.

Roberts told the court that he was a trained polygraph operator, having conducted 200 to 225 polygraph sessions from 1965 to 1973. His involvement in the Milgaard case started in 1969 when he was asked to go to Saskatoon to assist police and polygraph two witnesses – Wilson and John. He arrived there on the night of May 22nd, 1969 and was briefed by Supt. John Wood and other officers, reviewed some notes, went to the crime scene and then spent the next day interviewing and polygraphing Wilson and interviewing John. Then he returned to Calgary.

Roberts did not have any notes or reports to refresh his memory, although he had recently read the trial transcripts of Wilson, John, Karst and a few others.

From the Supreme Court transcript it appears that Roberts did not have a good recollection of his dealings with Wilson and John in 1969. His testimony was often based on what his normal practice was as opposed to specific recollection.

He said that he would normally interview a subject, getting his version of events and then draft questions which could be answered by a yes or a no. There were no surprise questions. He would then apply the polygraph apparatus and ask the questions, taking 4 to 5 minutes. The test would be repeated. The total time to prepare the witness, go over his version of events and conduct the test (asking questions) was approximately two hours.

Normally, he would test a "known lie"⁴⁷⁴ to get a reading on the polygraph showing deception. One of the questions he used was "Did you ever intentionally hurt anybody?"⁴⁷⁵ He explained that everyone in their life has done that and a negative answer will show deception.

As to Wilson and John, he related being told by Saskatoon Police before the interview that Milgaard was believed to have committed the murder. Wilson and John were not suspects but the police believed they were holding back and not telling the truth. Roberts proceeded on the basis that Milgaard committed the murder and that Wilson and John had incriminating evidence which they were withholding from the police. He saw his job as a polygrapher to get them "to tell what they knew about it, truthfully".⁴⁷⁶ Before he even met or questioned Wilson and John, he believed that they were "holding back or not telling the truth"⁴⁷⁷ to him.

(i) Ron Wilson Polygraph

Roberts described his interview and polygraph test of Wilson. No one else was present. He asked Wilson to provide his recollection of what happened on the morning of January 31, 1969 and was told that they arrived in Saskatoon and were driving around looking for directions, got stuck, Wilson got out to try

474	Docid 043300.
475	Docid 043300.
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477	Docid 043300.

and look for help and came back to find that John was "highly agitated".⁴⁷⁸ Apart from that, Wilson did not provide any further information about Milgaard's activities that morning. He said they drove away or got pushed and then went to visit somebody. Wilson did not give any incriminating evidence in the first interview.

Roberts told the Court that "of course, he did not admit to anything, or of seeing anything."⁴⁷⁹ Roberts then told Wilson "I think you know more than you're telling me."⁴⁸⁰ Wilson denied this allegation and said he had told everything but agreed to the polygraph test when asked.

About specific questions asked, Roberts testified:

Now as far as I can recall – and I would normally do this, because you're trying to find the person who did do the murder – I ran what was known as a SKY test. S-K-Y. The reason for being called that is one of the questions you would ask is: Do you suspect anyone of committing this murder, or murdering Gail Miller, whichever question I used at that time. The next one would be: Do you know for sure who killed Gail Miller, or who committed this crime? The last one, with a "Y" in it, did you commit this crime, or did you kill Gail Miller.⁴⁸¹

Roberts said that he went through these questions with Wilson before he did the polygraph test and Wilson was allowed to read the questions interspersed with others of a general and unrelated nature.

The polygraph showed, according to Roberts, that Wilson was being deceptive and had lied on two questions, "do you suspect" and "do you know" who killed Gail Miller, when he replied "no".⁴⁸² Roberts repeated the test with the same result, again concluding that Wilson was being deceptive. He then interrogated Wilson, saying to him "I think you're lying to me, Ron".⁴⁸³ Wilson challenged this and asked where or when. Roberts said he showed him the variance on the charts and Wilson told him that there must be something wrong with the machine.

Roberts asked Wilson to explain his lies and according to Roberts:

He finally said that Milgaard had made a remark to him, and he said that he kind of thought that he wasn't sure, and he couldn't really say for sure that he was the one. I asked him then, I said "Well what did he say to you?" He said that he had hit the girl. He had hit a girl. Now I took it to mean Gail Miller. I said "Did he say the girl in the back alley", and he said "Well I knew it was the girl in the back alley and he said he hit the girl." I said, "What did you take it to mean by that". Well, he says, "Then he murdered her." He didn't say "murdered", he said something else, but it meant the same thing. "Killed her" I think he said.⁴⁸⁴

Roberts said Wilson told him he had not seen the murder but that Milgaard twice told him that he had killed the girl. He asked Wilson if he would give a statement to police and Wilson agreed. Saskatoon Police were contacted to pick him up. When Karst arrived, Roberts said that he told Karst "Ron has now told me what had happened. Milgaard told him that he hit a girl or killed a girl in the back alley and he

478	DocId 043300.
479	DocId 043300.
480	DocId 043300.
481	DocId 043300.
482	DocId 043300.
483	DocId 043300.
484	DocId 043300.

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wants to tell you about it."⁴⁸⁵ Roberts testified that his last words to Ron were "Thanks, Ron, make sure you tell everything."⁴⁸⁶ Wilson was taken to the Saskatoon Police station where he gave his May 23, 1969 statement to Karst. Roberts said that his first session with Wilson took approximately two hours.

Roberts did not have any notes or report on his interview, nor did he have the polygraph charts. His file, if there was one, had not been provided to Saskatoon Police nor to the Crown in 1969. Efforts to locate the files in 1990 were unsuccessful.

Roberts testified that the Wilson test was one of over 200 he conducted during an eight year period. His involvement in the Miller investigation was limited to his interviews of Wilson and John. When Williams first contacted Roberts in June 1990, as part of the first application investigation, Roberts told Williams that he remembered interviewing Wilson and John but after 20 years, could not recall the details.

According to Roberts and Wilson, Wilson did not provide any inculpatory statements to Roberts before he was polygraphed. The day before, Wilson had told Saskatoon Police that Milgaard was away from the car for approximately 15 minutes and "that this was the time that Milgaard was probably involved in a murder".⁴⁸⁷ But he went farther with Roberts after the polygraph test, saying that Milgaard had a maroon handled knife, that he admitted killing a girl, and that Wilson observed blood on his clothing. This incriminating information was offered only after Roberts told Wilson that he lied regarding his knowledge of who committed Miller's murder.

Roberts told the Supreme Court that he thought he used the "SKY" test because that is what he normally did. In cross examination by Wolch, Roberts agreed that he also asked Wilson the question "have you ever intentionally hurt someone" because that is a "known lie" question. He had not recalled that question until Wolch mentioned it. Roberts denied that Wilson's answer to this question was one of the "two lies"⁴⁸⁸ detected in Wilson's polygraph.

However, another record of the questions which Roberts asked Wilson in 1969 was never put to Roberts. On September 3, 1969 Caldwell telephoned Roberts in Calgary asking about his interview and polygraph of Wilson, and made notes of the conversation. The discussion was during the preliminary hearing at a time when Caldwell was considering calling Roberts to testify. At the Inquiry, Caldwell explained the note and its abbreviations:

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487	Docid 009264.
488	Docid 043300.

Original Note

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Frank Rabato Col City Police.
Det. # 2625400 Home # 2892412

1. There is a chart that remains in
in R-2 room is the inter-
view.

- Did on Wilson, not on
Sohn.

- Interpret. of chart. he could
read chart - + he id. look at
it.

- Will call back at 1.30
over time.

* - Re Wilson lying on 2 Q's.

1. W. had on 2 Q's. -

2. Don't let out chart unless
asked. to it. Chief's address.
Chart doesn't have questions.

3. Clatter as
(ask Wood) + call to emergency.

4. as you holding back anything. re?

5. did you ever intentionally interview?

yes. c. have you lied to any Q. on this test?

007022

2.
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Wilson Q's:

① Do the Q's as, are you delib.
holding back any info. re Miller?

② Have you lied to any Q. on
this test? (ad. refers to did you
ever hurt anyone - or - to the Q.
whether he was holding back.)

- W. didn't see it
- " " " " do it
(You know for sure who did
it?) yes

W. told Roberts -> that in Calgary,
Dave told him:
-? & took her small
-> & took her w. knife a few
times.

607623

Caldwell explained the abbreviations in his note to the Inquiry:

Re. Wilson lying on two Questions

1. Wilson lied on two questions.
2. Don't let out charts unless subpoenaed to court. Chief's orders. Chart doesn't have questions.
3. Clothes exhibit (ask Wood) and back to same guy.
 - a. Are you holding back anything re Gail Miller?
 - b. Did you ever intentionally hurt anyone?

yes

- c. Have you lied to any Question on this test?

Wilson Questions

1. Re the Gail Miller murder, are you deliberately holding back any information re that?
2. Have you lied to any Question on this test? (could refer to did you ever hurt anyone or to the Question whether he was holding back)

- Wilson didn't see it

- Wilson didn't do it

(you know for sure who did it?) yes.

Wilson told Roberts that in Calgary, Dave told him:

- I took her purse

- he poked her with knife a few times.

Although Caldwell's note was disclosed to the parties at the time of the Reference it was not part of the Reference Case, nor was Roberts questioned about it. Caldwell was not called as a witness.

At the Inquiry, Caldwell could not recall anything further about the note and could only say that he recorded what Roberts would have told him at the time.

Caldwell's note raises the possibility that Roberts might not have used the "SKY" test he described to the Supreme Court. Judging from the note, Wilson's "two lies" might have been in response to two questions that were unrelated to the Gail Miller murder (did you ever intentionally hurt anyone? and have you lied to any question on this test?). Another interpretation of the note is that Wilson lied to the question of "are you deliberately holding back any information on the Gail Miller murder?".

There appears to be a discrepancy between Roberts' recollection at the Supreme Court and what Caldwell recorded in 1969. But Roberts was not questioned about the Caldwell note at the Supreme Court. It is cryptic and not self-explanatory but does, however, invite the inference that Roberts really had no present memory at the Supreme Court of what he asked Wilson in 1969.

By Roberts' own account, however, Wilson recited Milgaard's admission about killing a girl only after Roberts had confronted him with a deceptive polygraph result.

Roberts testified that when he interviewed John right after Wilson, he disbelieved her when she said that she had not seen anything that morning, and he continued to question her. He had just heard from Wilson of Milgaard's admission that he "hit or killed"⁴⁹¹ a girl while he was out of the car. Both Wilson and John have testified that when Wilson left the polygraph session he told John something to the effect of "let's sink him".⁴⁹² Whether the results of the Wilson questioning were used by Roberts in his John interrogation is unknown, but the sequence of events leaves open the possibility.

Roberts' polygraph of Wilson was relied upon both by Saskatoon Police and the prosecutor as adding credibility to Wilson's May 23 and 24 statements and to the evidence he gave at trial. They believed that the most incriminating evidence in Wilson's statements was verified by polygraph. It was not, because Roberts did not use the polygraph to test the truth of what Wilson said he heard from Milgaard but rather to test whether Wilson was telling all he knew. The Supreme Court heard Roberts say that he detected

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deception on the questions of "do you suspect" and "do you know who" killed Gail Miller. What later came from Wilson was not verified by polygraph.

(ii) Nichol John Interview

Roberts interviewed John immediately after Wilson, asking first for her version of events. He described her as nervous, telling basically the same story as Wilson's pre-polygraph version. She told Roberts that they stopped somebody for directions and then the car got stuck close to the alley. She could see down the alley. She said Wilson and Milgaard left the car.

I said to her, "And what happened then?", and she hesitated and hummed and hawed and I said, "Well, something must have happened". She said "Well I can't remember". That was what she said, I can remember her saying that, "I can't remember..."⁴⁹³

Roberts testified that he did not believe that she could not remember and continued:

I spoke to her for some time and went through it again. You must realize, in these things, you go over certain things repetitiously to see whether there's any variance in the story. I suppose I spoke to her for half to three-quarters of an hour. I finally had the clothing, apparently that was worn by Gail Miller in a room in a plastic bag...

Now, during this she kept saying, "No I don't remember I don't remember." I said, "Well I think you do remember but for some reason or other you don't want to tell me." I took the white - I can recall a white uniform being there, and it was in a plastic bag and I gave it to her. I said, "What if this had been your sister?" and she burst out, she said "My God, I do remember. I do remember. I saw him fighting with her down the lane. I saw him stab her." I said, "Well, now you remember" and she said, "Yes". I said, "Was there some reason you didn't want to tell me before?". She said, "I couldn't tell you before. I didn't remember until I saw the dress."⁴⁹⁴

John then said that she thought she got out of the car and ran but did not know where, "I must have got back in the car, because I was there when Ron came back." She said she could not remember what happened then.

Roberts asked John if it would help her if Wilson came back and the three of them sat down and talked about it. She agreed, Wilson returned, and the three spoke for about three-quarters of an hour. Roberts made no notes of this discussion but said that he would have told Wilson John's version of events and remembered Wilson saying "Well, I didn't see that. I guess I was away from the car."⁴⁹⁵

Roberts then turned John over to the police to give a statement and returned to Calgary that night.

Roberts played no further role in the taking of written statements from Wilson or John. In fact, he never saw the statements until the Supreme Court hearings. He had some contact with the prosecutor around the preliminary hearing and trial date and travelled to Saskatoon for the preliminary hearing but was not called as a witness.

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495	Docid 043300.

Roberts denied that he “brainwashed, misled and manipulated”⁴⁹⁶ Wilson.

In his cross-examination by Wolch, Roberts described Wilson as being a lot calmer than John. He said that he knew Wilson had previously been in trouble with police and that “He exhibited the behaviour of somebody that had been previously questioned by the police and wasn’t going to tell them too much. In other words, he just wasn’t going to squeal on anybody.”⁴⁹⁷

Wolch also suggested to Roberts that after Wilson gave his first incriminating statement to the police, he met with John, and that what he learned from John might have caused him to change his story, namely that he left the vehicle. Roberts denied this and said that Wilson told him that he had left the vehicle when Milgaard did, before Wilson or Roberts ever talked to John.

(k) Larry Fisher Evidence

Fisher had applied for intervener status and was a party before the Court. He was required to testify as a witness, and was to provide bodily substances for secretor and DNA tests. The samples he gave were used as well in the 1997 DNA testing.

Fisher testified that he did not rape or murder Miller. Wolch had full opportunity to examine him about the Miller murder and his own previous sexual assaults.

Linda Fisher testified and essentially repeated what she had told the Milgaards, Pearson and Williams in 1990.

5. Submissions and Arguments

In written submissions filed with the Supreme Court, Saskatchewan Justice argued that Milgaard had failed to establish a miscarriage of justice on any of the three grounds set out in the Supreme Court’s guidelines:

In our submission, Mr. Milgaard’s evidence is not credible and is both self contradictory and contradicted by other witnesses.⁴⁹⁸

Their submission compared Milgaard’s evidence with the evidence given by other witnesses and in particular Tallis. The brief identified 11 areas where David Milgaard is alleged to have “lied” and concluded by saying:

It is our submission that David Milgaard’s denial of guilt is not credible and should not be accepted. In the final analysis, very little of what Mr. Milgaard told this Court about the major issues in this case is true. Under the circumstances, there is no reason to believe that denial of guilt is any more credible than the rest of his evidence.⁴⁹⁹

Based on the fact that Wilson admittedly lied to the Court and had a bias or interest in helping the “Milgaard team”,⁵⁰⁰ Saskatchewan Justice submitted that:

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497	Docid 043300.
498	Docid 234332.
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Chapter 3 Overview of Facts

Nothing Mr. Wilson has said in his recantation can be accepted unless there is corroboration for what he says found in the evidence of others or in previous testimony of his from the trial.⁵⁰¹

With respect to the Fisher ground, Saskatchewan Justice acknowledged that there were two distinct arguments. First, had defence counsel at trial known about three previous Fisher assaults it would have "made a big difference to the trial outcome".⁵⁰² The second aspect was that the evidence available since 1971 "clearly shows that Larry Fisher is guilty".⁵⁰³

On the first, Saskatchewan Justice argued that due to the lack of similarity and lack of pattern between the Fisher offences and the Miller murder, the offences would have been of "little value"⁵⁰⁴ to defence counsel.

On the second Fisher ground, Saskatchewan submitted that there was no similar fact evidence or other evidence involving Fisher which linked him to Miller's crime.

In their written submission, Milgaard counsel argued Crown and police misconduct as a basis to find a miscarriage of justice, stating: "It is the position of David Milgaard that highly coercive and improper police tactics led to the witnesses, Wilson, John and Cadrain, eventually giving statements that incriminated Milgaard."⁵⁰⁵

They referred to John's statement being provided "after coercive police questioning"⁵⁰⁶ and being "subjected to the highly objectionable techniques of inspector Roberts."⁵⁰⁷

Regarding the conduct of the Crown, the brief stated "it is submitted that the original trial was severely flawed by the failure to provide full disclosure."⁵⁰⁸ The brief described significant volumes of information that was "withheld"⁵⁰⁹ from the Milgaards. In conclusion, counsel referred to the fact that Milgaard "had long maintained that his conviction was obtained on fabricated evidence."⁵¹⁰

With respect to the Larry Fisher evidence, Milgaard's position was that "the case against Larry Fisher is extremely strong, and in fact amounts to proof beyond a reasonable doubt of his guilt."⁵¹¹

And on the motel room incident:

It is therefore submitted that when the motel room evidence is examined in its entirety, the most that can be said is that David Milgaard, under the influence of drugs, made a statement in a manner and in circumstances consistent with sarcasm and poor taste.⁵¹²

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508	Docid 218223.
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6. Supreme Court Decision

On April 14, 1992, the Supreme Court released it's opinion and findings:

It is appropriate to begin by stating that in our view David Milgaard had the benefit of a fair trial in January 1970. We have not been provided with any probative evidence that the police acted improperly in the investigation of the robbery, sexual assault and murder of Gail Miller or in their interviews with any of the witnesses. Nor has evidence been presented that there was inadequate disclosure in accordance with the practice prevailing at the time. Milgaard was represented by able and experienced counsel. No error in law or procedure has been established. At the conclusion of the first trial, there was ample evidence upon which the jury, which had been properly instructed, could return a verdict of guilty.⁵¹³

Having heard evidence from Karst, Roberts, Wilson, John, Cadrain and Milgaard, the court concluded that the police did not act improperly in the investigation and interviewing of witnesses. The issue of police misconduct had been argued by Milgaard and was not accepted by the Supreme Court. It did not conclude that Milgaard had been framed, as had been alleged in the media.

Further the court stated that there was no Crown misconduct relating to disclosure based upon the practice at the time.

After commenting on the investigation, Crown conduct and the fairness of trial, the Court said:

However, fresh evidence has been presented to us. Ronald Wilson, a key witness at the trial, has recanted part of his testimony. Additional evidence has been presented with respect to the alleged motel room confession. More importantly, there was evidence lead to sexual assaults committed by Larry Fisher which came to light in October 1970, when Fisher made a confession.

In our view, this evidence, together with other evidence we have heard, constitutes credible evidence that could reasonably be expected to have affected the verdict of the jury considering the guilt or innocence of David Milgaard. Our conclusion in this respect is not to be taken as a finding of guilt against Fisher, nor indeed that the evidence would justify charging him with the murder of Gail Miller.⁵¹⁴

The Supreme Court thus found merit in the second aspect of the Fisher ground which had been advanced on both the first and second s. 690 applications. They mentioned as well the Wilson recantation and new motel room evidence.

The Court concluded that it was not satisfied either beyond a reasonable doubt or on a preponderance of evidence that Milgaard was innocent of the murder of Gail Miller.

Given the new evidence, the Court advised the Minister to quash the conviction and direct a new trial of Milgaard under s. 690(a) of the *Criminal Code*. Accordingly, it would not discuss the evidence in detail or comment upon the credibility of the witnesses:

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DocId 058828.

Without being exhaustive it will suffice to observe that there is some evidence which, if accepted by a jury could implicate Milgaard in the murder of Gail Miller.⁵¹⁵

The Court noted that there "were a number of differences in the testimony given by Milgaard and Justice Tallis on this reference".⁵¹⁶ It described the motel room incident:

In addition there is the evidence of the motel room incident which could be taken as an admission of murder by Milgaard, or as a joke made in very poor taste, or as mere drug induced rambling.⁵¹⁷

It concluded:

While there is some evidence which implicated Milgaard in the murder of Gail Miller, the fresh evidence presented to us, particularly as to the locations and the pattern of the sexual assaults committed by Fisher, could well affect a jury's assessment of the guilt or innocence of Milgaard. The continued conviction of Milgaard would amount to a miscarriage of justice if an opportunity was not provided for a jury to consider the fresh evidence.⁵¹⁸

After directing that the conviction be set aside and a new trial ordered, the Court said it would be open for the Attorney General of Saskatchewan to enter a stay if that was deemed appropriate in all of the circumstances. However, if a stay was not entered, a new trial proceeded and a verdict of guilty returned, then the court recommended that the Minister of Justice consider granting a conditional pardon of Milgaard. The message to Saskatchewan Justice was clear.

Part XIII – Supreme Court Reference Aftermath

1. Saskatchewan Justice Response to the Supreme Court Decision

Following the Reference decision, the federal Minister accepted the advice of the Supreme Court and ordered a new trial for Milgaard. His 1970 conviction was set aside. On April 16, 1992, the Attorney General of Saskatchewan filed an indictment charging Milgaard with second degree murder, and immediately entered a stay of proceedings and he was released from prison.

Notwithstanding his release, the decision did not provide him with all of his desired relief. In fact, the decision was a setback to Milgaard's effort to be exonerated and to recover compensation for his wrongful conviction. While he would not face another trial, he did not have an opportunity to be acquitted. He was presumed to be innocent in law, but at the Supreme Court he had a rare opportunity to get an opinion on factual innocence which might have opened the door to official exoneration and compensation. Instead the Court said that he had not proven his innocence, either beyond a reasonable doubt or on a balance of probabilities. The Court's opinion was followed by a stay of proceedings by Saskatchewan which denied him even the chance of a not guilty verdict in Court. At the same time, of course, it shielded him from a possible finding of guilt on a new trial.

515 Docid 058828.
516 Docid 058828.
517 Docid 058828.
518 Docid 058828.

With nothing further to expect from Justice Canada, the Milgaards turned their attention to Saskatchewan Justice who, by this time, were ready to respond to the media campaign which they expected would follow the Supreme Court decision.

The Supreme Court concluded that Milgaard had had a fair trial in 1970; that improper Crown or police conduct had not been shown; that he had been represented by able counsel; and that no error in law or procedure had been established. The Court also declared that "there is some evidence which if accepted by a jury could implicate Milgaard in the murder of Gail Miller",⁵¹⁹ Taking note of these conclusions, Saskatchewan relied as well upon the finding that Milgaard had failed to prove his innocence either on the criminal or civil standard, that police or prosecutorial conduct had not been shown, and that disclosure had met the standards of the day. Based upon the Supreme Court statement that "the continued conviction of Milgaard would amount to a miscarriage of justice if an opportunity was not provided for a jury to consider the fresh evidence",⁵²⁰ and because a new trial had been ordered, Saskatchewan's conclusion was that Milgaard's 1970 conviction was not a miscarriage of justice.

As a result, Saskatchewan Justice did not reopen the investigation into the death of Gail Miller. On April 16, 1992, the Attorney General announced that he was entering a stay of proceedings, having interpreted the Supreme Court statement that "it would be open"⁵²¹ to the Attorney General to enter a stay as an invitation to do so.

The Attorney General also announced that the government would not be ordering a commission of inquiry. The issues of police and Crown misconduct had been dealt with by the Supreme Court and the government would not be offering any compensation to Milgaard.

Milgaard's failure to establish innocence at the Supreme Court was relied upon by Saskatchewan Justice to deny him compensation for his previous conviction. At the time, the guidelines for compensation for wrongful conviction required proof of innocence on a balance of probabilities. Brown told the Commission that had the Supreme Court found probable innocence, negotiations on compensation would have followed.

With the experience of the s. 690 applications behind them, Brown said that Saskatchewan Justice became very proactive in publicizing the facts, as Saskatchewan Justice saw them, arising out of the Supreme Court decision.

Milgaard counsel interpreted the decision differently and engaged in an exchange of letters and public debate with Saskatchewan Justice as to the effect it had on the issue of police and Crown misconduct, Milgaard's claim of innocence, and entitlement to compensation.

By letter dated April 20, 1992 to the Attorney General, Wolch expressed his view that the Supreme Court decision was "prima facie evidence of blameworthiness"⁵²² on the part of the police and Crown in failing to deal with the Fisher confession and convictions in October 1970 and afterward. Wolch went further and identified "the three main 'players'"⁵²³ whose role had to be scrutinized – Karst, the person who took Fisher's statement and Caldwell and Kujawa who were involved in the prosecution of Milgaard and Fisher.

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522	Docid 026935.
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It was alleged that all three connected Fisher's conviction to Miller at the time and took steps to cover it up.

Saskatchewan Justice responded that Wolch's assertions were rejected by the Supreme Court who had considered the effect of the Fisher convictions on Milgaard's conviction and concluded that there was no wrongdoing by either police or Crown. "All of the allegations of misconduct you are now raising were put to the Court".⁵²⁴

Wolch further replied on August 27, 1992, saying that the Supreme Court Reference was not broad enough to consider the allegation of misconduct with respect to the handling of the Fisher convictions and that he was specifically directed by the Court not to raise issues of Crown misconduct. In fact, he said, he was told by Saskatchewan Justice they would object if he tried. Brown and Fainstein, counsel for the federal Minister, both denied this at the Inquiry.

Wolch's letter alleged that the Fisher information which came to light in October 1970 was "willfully suppressed by the Crown Attorney's office".⁵²⁵ It was the view of Saskatchewan Justice that that issue either was determined by the Supreme Court or could have been if Wolch had called evidence. Brown said that Kujawa and Caldwell's conduct relative to any miscarriage of justice arising from the Milgaard conviction, including how the Fisher convictions were dealt with, were matters squarely before the Court and Caldwell and Kujawa were both prepared to testify if Wolch wished. Brown said that he had no objection to any questioning regarding Kujawa and Caldwell's conduct in handling the Milgaard or Fisher matters.

By the fall of 1992, Saskatchewan Justice had publicly rejected the contention of police and Crown misconduct, were not willing to investigate further and would not consider compensation to Milgaard who, in their words, had not been able to "convince even one justice"⁵²⁶ that he was probably innocent.

In September, 1992, the Milgaards held a press conference making allegations of official wrongdoing against senior Saskatchewan Justice officials. As Joyce Milgaard told the Commission, to get compensation they needed to push Saskatchewan Justice to attract public support for their allegations of police and Crown misconduct. The allegations of Breckenridge, made public by the Milgaards in September 1992, fit the bill perfectly, she agreed.

Although unsubstantiated, false and without any merit, the allegations had publicly involved the Premier of Saskatchewan, so they needed answering. A two year RCMP investigation followed and the conclusion by investigators and by Alberta Justice was that no wrongdoing by police, Crown or anyone else in Saskatchewan Justice had been shown.

2. Michael Breckenridge

(a) Introduction

In March, 1992, Breckenridge wrote to Wolch claiming that he worked in the office of the Saskatchewan Attorney General at the time the Fisher and Milgaard files were being handled. His letter described "closed door meetings"⁵²⁷ between Attorney General Roy Romanow, Deputy Minister Ken Lysyk and Kujawa

524	Docid 164797.
525	Docid 162865.
526	Docid 020392.
527	Docid 159537.

examining "discrepancies"⁵²⁸ in the Fisher and Milgaard cases. He purportedly delivered both the Fisher and Milgaard files to Kujawa's office at the same time. The letter included rambling political commentary, concluding with the allegation that "there is a cover-up by the present administration to hide the sins of the Blakeney regime".⁵²⁹ The letter, on its face, was not credible.

Wolch did not immediately reply. In May, 1992, the Milgaards hired a private investigator to verify Breckenridge's story. Two interviews were held, one including Joyce Milgaard. Breckenridge gave a "statement"⁵³⁰ on May 22, 1992 supplementing his earlier letter. He could not substantiate anything in either the letter or the interviews and his credibility was suspect. The investigator was not asked to go further. No effort was made to verify that Breckenridge actually worked with the Attorney General's Department in 1970 and 1971 when both the Fisher and Milgaard files were active. The Milgaards last contact with Breckenridge was June 14, 1992.

Joyce Milgaard told the Commission that in the fall of 1992, they needed something to get attention in the media and to get the attention of Saskatchewan Justice who was not listening to their claims for compensation and exoneration. On September 19, 1992, David and Joyce Milgaard and Wolch held a press conference in Winnipeg where they publicized Breckenridge's unsubstantiated allegations of criminal wrongdoing against senior governmental officials, including then Premier Roy Romanow.

The allegations were widely publicized, although the media quickly verified that the "source" of the information did not work for the Saskatchewan government at the relevant time.

Initial investigation by the RCMP and Saskatchewan Justice confirmed that the Breckenridge allegations were baseless. However, because senior members of the Attorney General's office and the Premier were implicated, the Deputy Attorney General asked the RCMP to conduct a criminal investigation into the Breckenridge allegations and report directly to the Alberta Deputy Attorney General to avoid conflict. The mandate at first was to investigate the Breckenridge allegations amounting to obstruction of justice, but it expanded to investigation of every aspect of the Milgaard and Fisher cases for criminal conduct or even ethical breaches.

After a two year investigation, the RCMP concluded that the Breckenridge allegations were absurd. There was no evidence of any criminal misconduct by any of the people involved in the Milgaard and Fisher cases.

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530	Docid 004012.

(b) The March 21, 1992 Letter

March 21, 1992

Regina, Sask.

Mr. Hersh Wolch,

I have been watching with interest the David Milgaard case since I worked in the Attorney General's Dept. in Sask. at the time of those cases (Fisher and Milgaard). My job was to process the criminal files. Serge Kujawa had just been appointed Chief Crown Prosecutor for party loyalty. Roy Romanow had just been elected and appointed Attorney General and wanted to make a name for himself. Attorney General ^{Mitchell} was Romanow's law partner in Saskatoon.

At the time of those cases there were many closed door meetings between Romanow, Ken Lysyk -Deputy Minister and Serge Kujawa all because discrepancies in the two cases. I remember delivering both cases to Serge at the same time. The general feeling in the Dept. at the time was that these were to high profile cases that the N.D.P. could appear to get great political mileage from as part of their law and order platform. They figured that since they were the gov't nobody would ever question the findings of their court system. Since then, like now, their only objective was to govern at any cost.

Some other people in the Dept. that can attest to this are Mr. Dale Richter now with C.S.I.S. living in Qu'Appelle, Mr. Dave Wolbaum now working at the P.C.O. in Regina and Mr. Maurice Herauf now a lawyer in Regina.

Today, I would suggest that there is a cover up by the present administration to hide the sins of the Blakeney regime. I would also suggest that that main motivation is political as opposed to legal. With people like Ned Shilling, Louise Simard and Serge Kujawa all part of both the present and past regimes they have too much to lose by having that association made.

All of these people have deep rooted beliefs that the system is more important than any individual rights and they will now do everything they can to change the law to eliminate those rights. I would suggest you use all the resources at your disposal to push for an inquiry held by anyone outside the S.D.P. system in Sask., B.C., Ont., otherwise it will never receive an impartial hearing. These people will use every means at their disposal to make sure that they stack the deck in their favor.

My phone number is

Yours Truly

^{5^{MB}}
4/13/93 M. Buckridge

(c) Milgaard Investigation into the Michael Breckenridge Allegations

Robinson Investigations was retained by Milgaard counsel to look into the substance of Breckenridge's letter. Robert Perry of that firm acted, meeting with Breckenridge on May 14, 1992. He reported that the interview covered a number of topics including Breckenridge's past and present employment, and his knowledge of the criminal records department of the Saskatchewan Ministry of Justice during 1970 and 1971, noting that Breckenridge was unable to provide specific details regarding the handling of the Milgaard matter and that much of his information was speculative and based on his opinion and suspicions as well as those of his co-workers. Perry said that Breckenridge seemed forgetful when making reference to specific years of his past and present employment and yet concise when discussing political details and motivation.

Perry asked Breckenridge to give the matter further thought and to be more specific about the Milgaard matter, particularly on dates and occurrences and to write a statement. Breckenridge told him a week later that he was "having problems organizing his thoughts"⁵³¹ but would provide a statement soon. He provided a statement on May 22, 1992:

STATEMENT

As to events surrounding the Milgaard Case:

I was hired to the Blakeney gov't in approximately 1970 or 1971. I started in the Dept. of Ind and Commerce, the minister was Kim Thoreson. After approximately 6 mos. there I transferred to the Attorney Generals' dept under Roy Romanow. Here I stayed until my job was threatened by Serge Kujawa. Then I transferred to the Highway Traffic Board in Moosomin under Robert Hogg.

All positions in the provincial gov't were received because I was a card carrying member of the N.D.P. at that time. At first the positions were temporary and then made permanent. When a position was found where you were most useful you were appointed by Order in Council if you ranked high enough in the party or were told to write a Public Service Commission exam to legitimise your appointment, the same as is being done today. I wrote the exam.

After working within the dept for some time trust of the minister and others was gained. I went from working 8 hours a day in criminal records to running errands for the minister that were party business. All during this time in the dept. Serge Kujawa was Chief Crown Prosecutor and Bill Logan was liaison officer between police dept's.

My specific job was to receive the mail and date it, sort it, place file numbers on it, direct it to the proper attorney, and match it to the proper file for filing. In order to do this

all correspondence had to be read. At first this was menial boring work but that changed as we began to get mail marked everything from "Private and Confidential" to "Eyes Only" that was directed to Mr. Romanow.

004012

may 22/92
M. Luchie

We didn't open this mail but usually ended up getting it back for filing. Sometimes this would be quite soon other times it might be months before it returned to our section for filing. Often when this mail arrived we had to pull the corresponding file and take it to the ministers office or Serge's office as he usually made the final decision in consultation with the minister and whoever else in the dept that needed to know. We were often aware of these meetings because after we delivered the file the attorneys would meet behind closed doors and our section was told to stay away from that meeting, although, there were times when they would request another file at the same meeting. This often happened with the Milgaard and Fisher files. Also there was a paper shredder kept in the ministers office that was used quite extensively in cases of very sensitive material that would do damage to the gov't, in such cases, I was told that the gov't could claim ignorance of this matter thereby escaping any political heat.

On the Milgaard case it was brought to my attention by Dave Wolbaum that according to the information we had been receiving it was becoming very evident that the Milgaard case was a mistake. From the correspondence we were filing our section was convinced that there was error made in the Milgaard case and this was brought Serge Kujawa's attention. We were told basically to mind our own business if we valued our jobs. After being told that our section began to apply for transfers or to find new jobs. This was done by everyone except Patricia Styles, who was the section head.

004013

may 22/92
M. Luchie

In Breckenridge's letter and statement, he identified fellow employees as having the same concerns and suspicions. Perry was not asked to seek corroboration from the employees.

On June 12, 1992, Perry met with Joyce Milgaard to discuss "various avenues of possible investigation",⁵³² and advised her to "fully discuss any future investigation with her lawyers".⁵³³ She asked Perry to set up another interview with Breckenridge. He did so in the belief that she had discussed the matter with her lawyers.

On June 14, 1992, Perry and Joyce Milgaard met Breckenridge for two and a half hours, yet she told the Commission she could not recall contacting Perry, and had little recollection of Breckenridge:

Q Do you remember meeting with Michael Breckenridge, like, personally meeting with him?

A I couldn't even put a face on the man. I know that I did meet with him because, you know, that was the intention, but it's not something that really stands out in my mind at all.

Q Do you have any recollection of –

A I wouldn't know him if I saw him on the street or if I had seen him.

Q But do you have a recollection of your interview with him, your meeting with him, his demeanour, his credibility and the contents of what he told you, do you have any recollection of that?

A No, I do not.⁵³⁴

She testified that she did not have concerns with Breckenridge's credibility or the information he provided. She "felt that this information was spot on because it just sort of was the icing on the cake to all the things that I had been believing all along".⁵³⁵

She said that "when Mr. Breckenridge came forward, I instantly believed the information he was giving because it so fit in with the picture that I had in my mind that I don't think for a minute I discounted it and I wanted to go forward with it".⁵³⁶ She confirmed that she wanted the information to be true and indeed "believed it was true."⁵³⁷

She acknowledged that they had not contacted any of Breckenridge's co-workers for confirmation of his allegations. She gave as a reason that in light of her experience with her previous investigations and the perception that she was "tainting"⁵³⁸ the authorities in their investigation, she felt it "would be wrong" to investigate the individuals named by Breckenridge and "thought it was really important that

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the government be checking that out, not me."⁵³⁹ Nevertheless, she told the Inquiry that she met with Breckenridge to make sure that "he was not just some sort of crazed nut".⁵⁴⁰

She told the RCMP in 1993 (as part of the criminal investigation arising from Breckenridge's allegations) that "the only thing that we did check out"⁵⁴¹ was that the people Breckenridge mentioned were working at the Department of the Attorney General at the time. She stated that she "found out they were there at the time" and that "at first flush (sic), it seemed good and I needed something right at that time to really go public with, and force the issue with it and so that's why I went public. Then we did some further digging ... digging, and it looked like he actually was not in that position at that time."⁵⁴² However "he couldn't have just manufactured the information because it fit in too well with all the facts that we know about".⁵⁴³

Joyce Milgaard testified that although she did not recall checking out the names of the other employees mentioned by Breckenridge, she must have. Based upon the comments she made in her 1992 RCMP interview, it seemed to her that she did not know that Breckenridge was not working with the Department of the Attorney General at the relevant time.

(d) Decision to Publish Michael Breckenridge Information

Although they met Breckenridge on June 14, 1992, Joyce Milgaard and Wolch did not make the information public until September 19, 1992. She testified that in the months following the Supreme Court of Canada decision, she was concerned that she might lose the public's attention, and that the Supreme Court's decision was being used by the authorities to say that David Milgaard had had his hearing, but lost. Media interest died down following the Court's decision. The challenge in the summer of 1992, therefore, was to get the story back in the public, and to put pressure on the provincial government to grant David a remedy or to establish a process to clear him and award compensation. She said that the Breckenridge information allowed them to renew the cover-up allegation.

Joyce Milgaard said that between June and September of 1992 she was trying to mobilize her supporters to write letters to Saskatchewan's Minister of Justice, and that it was the Minister's replies that prompted the release of the Breckenridge information in September of 1992. The Breckenridge press conference held in September of 1992, she said, was a "reaction of outrage"⁵⁴⁴ to the position taken by the Attorney General in his letters to the public, and to Milgaard's lawyers, explaining the Supreme Court decision.

(e) Preparation for the September 19, 1992 Press Conference

Joyce Milgaard testified that before the press conference, she asked Wolch's firm for assistance in articulating her position with respect to Breckenridge and other evidentiary matters. As she told the Inquiry, she "wanted to know what I was allowed to say"⁵⁴⁵ and "wanted to be sure that I was saying the right things and the truthful things".⁵⁴⁶ She testified that her lawyers would have assisted her in assessing her position so that she did not step "outside the line".⁵⁴⁷

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541	Docid 331214; and T31620.
542	Docid 331214; and T31620.
543	Docid 331214; and T31621.
544	T31569.
545	T31595.
546	T31595.
547	T31595.

Greg Rodin began assisting Wolch on the file when Asper left the practise of law in June, 1992. He wrote a memo to Joyce Milgaard dated September 16, 1992, responding to her request that "I articulate your position with respect to the above-noted matters".⁵⁴⁸ In the memo, Rodin advised:

- Breckenridge had been employed by the Saskatchewan Attorney General's office as a filing clerk in and around 1971 when Romanow was Attorney General. As such, he would be aware of files being considered by government members at any given time, including the Attorney General.
- Breckenridge says Romanow, Kujawa, and other senior officials met to discuss the Milgaard and Fisher files together.
- Breckenridge came forward on his own and was not their witness.
- The Supreme Court has confirmed that information relating to Fisher's assaults was available in October, 1970 but was not disclosed to Tallis or Milgaard. An inquiry is required to determine why this information was not disclosed in 1970.
- Breckenridge's evidence indicates that the Attorney General and senior officials considered the matter of the Fisher evidence as it related to Milgaard, so it is reasonable to conclude that a conscious decision was made by senior officials to withhold the evidence.
- The Breckenridge evidence appears to be credible and fits with the known facts.
- An inquiry is required to find out what other witnesses might know and to deal with other serious concerns relating to the "suppression of the Larry Fisher evidence."⁵⁴⁹

Her typed remarks for the September 19, 1992 press conference, she said, would have been drawn in part upon Rodin's memo.

(f) Hersh Wolch's September 16, 1992 Letter to Kim Campbell

On September 16, 1992, Wolch wrote to the federal Minister requesting a federal inquiry into the entire Milgaard matter, relying upon the new evidence from Breckenridge and enclosing a copy of the Breckenridge statement given to Perry.

Wolch noted that the statement made it clear that Breckenridge had observed activities in the Attorney General's office which suggested that a mistake had been made in the Milgaard case. He explained that when the information was brought to Kujawa, however, Breckenridge was told to mind his own business if he valued his job. Wolch also referenced Breckenridge's recollection that meetings would be held involving senior officials where the Milgaard and Fisher files would be considered together, including one involving Attorney General Romanow, senior attorneys and police officials. He concluded his letter by calling for a federal inquiry into David's case, noting that it would be impossible, given Breckenridge's allegations, for the Milgaard family to obtain an impartial inquiry in Saskatchewan.

(g) The September 19, 1992 Press Conference

David and Joyce Milgaard and Wolch all spoke at the 1992 press conference. The federal justice department had it recorded and a transcript made. In her prepared statement Joyce Milgaard said:

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549	Docid 048306.

... The new information is in this letter. It was sent on Thursday to the Justice Minister, Kim Campbell. A man who worked in the Saskatchewan Attorney General's office in and around 1970 when Roy Romanow was Attorney General, wrote to us. He explained he worked with files, reading them, pulling them out for meetings and re-filing them afterwards. He knew what - who was seeing what. His letter urged us to get an outside inquiry. He said we would never receive an impartial hearing with the Saskatchewan Government. He told of delivering the Milgaard and Fisher files, together, to Serge Kujawa. He told of meetings behind closed doors with Roy Romanow, Kujawa, and other senior police and Crown officials with the Milgaard and Fisher files.

We wanted to be clear that this is not our, quote, 'witness'. He is unconnected with the Milgaard family. What he says, however, fits in with the known and proven facts. The Supreme Court said the Larry Fisher evidence that the police had in 1970 was credible evidence which could affect the verdict of the jury. Justice Tallis said they never ever told him about Larry Fisher. Somebody suppressed that evidence and there has been no inquiry into it to see just how this happened. This new evidence says that these people had the files together. Since there was no disclosure, we can only assume a decision was made to suppress it. Pure and simply put, a coverup.

We are not asking for an inquiry based just on this new evidence but based on the evidence that was presented to Mr. Mitchell in April. There is ample evidence in that letter alone to justify an inquiry. We want an inquiry, we want the right questions asked, we want answers.⁵⁵⁰

After her opening remarks, she and Wolch responded to a number of questions. Wolch indicated that the new information was "simply more evidence of what we know to be a fact ... I think the letter simply adds one extra feature of evidence, but the coverup was established a long time ago, and this is just one more piece in the puzzle that's all it is."⁵⁵¹

And on Romanow's involvement:

Q What about the involvement of, ah, Romanow?

HERSH WOLCH: Time will tell, I - the coverup was there, the question was who covered it up is more important to be found out. Ah, um the difficulty we have is that um you have a situation where as we know David spent 23 years in jail. There is another individual out there somewhere, who we believe committed the crime. Ah, the Miller family right now has ah I guess an unsolved murder and the Attorney General for Saskatchewan says that, uh justice has triumphed. There is something questionable about that given that background. And then you have the person in charge of the case saying that the system's more important, ah, than correcting wrongs. You put that all together, ah, and you, it cries out for a full inquiry into what transpired. And now we have more evidence of coverup but I think we have that from the very mouth of Mr. Kujawa when he went on television and acknowledged he had both files.

Q Is the Premier of Saskatchewan directly involved in this, is he lying?

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HERSH WOLCH: I have ... I'm not saying that.

Q What are you saying then, Joyce? Is that what you are saying?

JOYCE MILGAARD: What we're saying is we have information that says Roy Romanow, and this is what we have said in the letter to the Minister of Justice – that he was in these meetings. Now I'm not about to judge his evidence. Ah I met with him and I thought that, uh, he was credible. I met with him and private investigators. We made sure that he was employed where he said he was at that time, and that the people he mentioned were also employed and that he in fact did the things that he said he did, but he's the one that has come forward and said that Roy Romanow was in these meetings behind closed doors. I think that Hersh properly has sent that information to the Minister of Justice and he's indicated how can we get an impartial hearing in Saskatchewan if that is a fact. So, the Justice Department, the federal, ah government - if they put an inquiry into place then we will find out exactly what is true.⁵⁵²

At the Inquiry, Joyce Milgaard testified that when she said "we made sure that he was employed where he said he was at that time", she was relying upon her lawyer's advice that that had been done, as well as upon what Breckenridge had told her. She had "no idea"⁵⁵³ where her lawyers had checked or what they had checked, but that was the information that she received back from them. She also understood that there had been some confirmation that the people Breckenridge mentioned were also employed there when he was. Her "understanding was that there had been some verification by [her] lawyers of his employment".⁵⁵⁴

Questions about Romanow's involvement continued:

Q Okay, if thats true are you saying that Roy Romanow was deliberately involved and knew that David Milgaard was innocent of this crime and he knew that the wrong man was in prison?

JOYCE MILGAARD: Perhaps I can tell you what this man told me, very succinctly. I mean he described and I've got it in my private, ah sort, of my additional comments there. He described what took place after one of these closed door meetings. Now Roy Romanow was in this meeting, okay. Kujawa was in the meeting, senior police officials were in that meeting. They come out after this session and uh, they had only two files in there. Like this man is responsible for what goes in and the only files that they had in this meeting were the Miller, Milgaard file and the Fisher file.

He described a scenario where someone else in the department seeing the files that Serge was returning said, – "gee it looks like theres been a travesty of justice in this Milgaard case now that we have the Fisher information". He said Kujawa in no uncertain terms told him to mind his own business, to keep his mouth shut, if he wanted to continue working there. And then looking around the room at that everyone who was there he said "and that goes for the rest of you too, if you know whats good for you"...

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553	T31597.
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Q Can I ask you when exactly that meeting took place? Was it after Davids conviction but before his appeal.

JOYCE MILGAARD: Yeah, it was during 1971 that these meetings took place when ah like the, they had both the files together at that time. And I guess a decision would have had to have been made. This man said that ah....

...

Q And Roy Romanow knew that the Fisher, I believe thats what you are telling me that Roy Romanow knew that there was something fishy going on here regarding having this extra information with Fisher, and he buried it?

JOYCE MILGAARD: All I know is that Roy Romanow, Serge Kujawa, and other senior officials met with those two files. Serge Kujawa says we never ever, - I never ever put them together. Now they told these people that put it together, or he told these people according to our source, that ah they had put it together because the file clerks had put it together and they, I mean their reaction you can imagine if you had just been told that these people just went back to their desks very quietly but their mouths sort of dropped open after this remarks from Serge and he explained that to us, our source said that shortly after that every one of those people in that department with the exception of one woman transferred out of Serge's department.

...

Q You've met with him and your private investigator?

JOYCE MILGAARD: Oh, yes, I've met with him. And he's - well I've got to tell you that people said to me why do you think he came forward? I think everybody has an axe to grind with government and this man may have his axe to grind, I don't know. But what impressed me about him and what makes me think he's credible is that he named names, like in his statement of other people that were witness to this conversation with Kujawa when he said this. Now someone that is telling lies they get to be very very vague about things you know. And they say, oh well, I don't know who was there, I don't know who said what. This man has named names and I think that its important for that to be followed up. And, quite frankly I didn't want to taint the evidence because you know, that that could have been the position government would take if I'd been out interviewing them.⁵⁵⁵

The media asked whether the information could have been tendered before the Supreme Court. Wolch responded that it was not relevant to the Supreme Court proceedings:

Q Why didn't he come forward during the Supreme Court hearings?

JOYCE MILGAARD: I don't know. That isn't a question I asked him Allan. I was very shocked at the time, ah.

Q Did you ask him [why] he didn't come forward?

HERSH WOLCH: Allan, just on that question, it wouldn't have been relevant to the Supreme Court. It simply wasn't relevant.

Q I was wondering ...

HERSH WOLCH: I'm not saying it affected him, but it wouldn't even have been admissible.

Q But why wouldn't he have come forward during all the publicity of the last year ...

HERSH WOLCH: That's the kind of thing that should be asked at an inquiry. The whole issue ...⁵⁵⁶

Questions about allegations against Romanow and Kujawa continued:

Q What are you saying about the Premier of Saskatchewan?

JOYCE MILGAARD: I'm just giving you the information that our source gave us. I'm giving you the letter that we sent to the government. We didn't judge him and I'm not, listen I'm not going to put myself into a position of judging the Premier of Saskatchewan but this source does say that he attended these meetings with those files so I think these questions need to be asked.

Q Do you believe the Saskatchewan government's response to calls for an inquiry has been tempered in any way by Roy Romanow's involvement?

JOYCE MILGAARD: It seems to me that ah if Mr. Romanow is involved as our source implies then, ah, certainly, it would be - it would certainly answer a lot of the questions that people had in mind why maybe Kujawa was never disciplined for his remarks and things like that.

HERSH WOLCH: One thing that's obvious is that the reasons so far given for not calling an inquiry are not valid. The reasons given to date such as it was all covered in the Supreme Court is simply not valid. It was the Supreme Court that said that credible evidence came forward in 1970 and in effect got buried then. Ah to now say we're not going to have an inquiry because everything was canvassed in the Supreme Court is not a valid reason. There has never been a valid reason given for not having an inquiry. In fact, the inquiry was turned down before we even asked for it. If you'll recall the answer was no before we asked. And uh, here's one more piece of evidence that comes forward that makes it to us pretty obvious that an inquiry should come from a federal source.

Q I would think if there were two files in a room in 1971 and they're sitting down and looking at these two files wouldn't you have been amazed, who do you think they (inaudible)

HERSH WOLCH: Anybody who put their two files together ah should come to the conclusion that Fisher is the person responsible and Milgaard isn't, if you put the two files together that's your conclusion. At the very least considerable doubt in David's case. At the very least.

...

Q Why do you think that Romanow and Kujawa buried this information shortly after David Milgaards conviction in 1970?

HERSH WOLCH: All I can say is that Mr. Kujawa has publicly stated ah ah rather shockingly that the system is more important than the innocence of one man. That the system has to be protected over the individual. He has said it. That's his own words as you've all heard. That perhaps answers your question.

...

Q You got this letter back in May. Why are we discussing it now? Why wasn't action taken earlier?

JOYCE MILGAARD: Well it took a long time for us to even find this like you know to go through this. Quite frankly my part of the problem is funding, uh, it takes money for a private investigator and that's something we haven't got a lot of any more. So ah ...

HERSH WOLCH: Or ever did.

JOYCE MILGAARD: Yes. And the private investigator, ah, we had to get one, he would go out and do a little bit and then when I had a bit more money he'd go out and do a little bit more. But ah, its taken awhile. And ...

...

Q Mr. Milgaard how did this source know that ah ah the Premier of Saskatchewan was in this meeting? How did he know that these people ...?

JOYCE MILGAARD: Well, you see, normally what happens and these were questions that I asked. Normally what happens they deliver the files right into the meeting. Ah, and you know doors are opened. The in and out as they need files they call them in. But in these particular meetings he said they were quite different. In these particular meetings, ah, he would see the people go into the meeting okay and the only two files that went in were these two files. Now, this incident that he described to me was after ah, Roy Romanow left the meeting, and, after the other officials left the meeting and when Serge Kujawa was returning the files to them right there. And that's when this whole incident happened that he described to me. And he said that there were many meetings like that.

Q One more question. Let me ask you.

JOYCE MILGAARD: Yeah.

Q Many meetings over a what were ...

JOYCE MILGAARD: There were many meetings that were held with these files with these two files.

Q Was this over a number of days or weeks?

JOYCE MILGAARD: He mentioned it was over a number of weeks that they were discussing it.

I'm just going to finish because I, I do want to indicate that I have written to the Prime Minister and I've said it seems only right and proper completely independent of the Justice Department should be appointed to investigate this latest information there could then be no question as to justice being done and I thanked him for you know I wanted to express how grateful I was for his assistance last fall and to point out that there are many Canadians as well as people in other countries that will be watching to see what happens in this case. Now justice must be seen to be done and I'm I'm urging him to use his good office to do just that and I'm urging the press support here to go out and find all the other people that were aware of what was going on and ask the questions that need to be asked.

Q You said that he gave you other names, the source gave you other names of people in the Department ...

JOYCE MILGAARD: That's right.

Q Have you contacted them?

JOYCE MILGAARD: We ascertained that these people did in fact Allan, work in the Department at that time and that they also transferred out.

Q _____ other people have heard the conversation with Kujawa?

JOYCE MILGAARD: That's right but I've not contacted them because -- Well funds are a big issue of it to go out and properly contact people like that, and plus you know the thought of this -- ah if I get involved in it automatically they seem to feel that I've tainted a witness you know. There was a lot in the Supreme Court, oh yes and Mrs. Milgaard came to see you didn't I. And they always pointed that out, so I think it's really important that I keep out of this and let the proper officials investigate and that's what we're doing.⁵⁵⁷

The September 19, 1992 press conference was widely reported in the media and Joyce Milgaard said she was "not disappointed"⁵⁵⁸ with the coverage.

On the day of the press conference, Saskatchewan Justice officials and Pearson determined that Breckenridge was not employed with the Department of the Attorney General until October of 1973, and that his statements were not corroborated by his fellow employees.

Notwithstanding the fact that Breckenridge did not work at the Department of the Attorney General in 1971, Joyce Milgaard told the Commission that she did not confront Breckenridge about it. Nor did the information change the position she advocated at the September 19, 1992 press conference, i.e., that there was a deliberate cover-up, because, as she told the Inquiry, she has always "believed there was a

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T31658.

deliberate cover-up. I believe it today".⁵⁵⁹ Breckenridge's information not being credible would not have changed her view as expressed at the press conference, she testified.

(h) Reaction from Authorities

Brown told the Commission about his reaction to the allegations that had been raised by the Milgaards and Wolch's request to Kim Campbell to hold a federal Inquiry:

- Q. And what was your reaction to that?
- A. Well, frankly, my reaction to the entire Breckenridge stunt was that it was so outrageously dishonest and malicious that we shouldn't even reply to it. However, other persons in the department, particularly I believe the deputy minister and the minister, determined that the matter had to be referred to the RCMP for an investigation.
- Q. And why do you say it was so dishonest and malicious?
- A. Because anyone with half an ounce of sense wouldn't believe that statement, would be very concerned about verifying the accuracy of it. To suggest that the Attorney General and the deputy and the director of prosecutions got together to conspire to suppress evidence is just nonsense and to release that without any real amount of checking and to discover a few days later that in fact Michael Breckenridge didn't even work in the department at that time, it clearly went beyond being careless to being malicious and it suggested a level of desperation that I didn't think had existed at that point. The other thing that it made it truly appalling is that this time they couldn't even excuse their behaviour by saying that this was aimed at a desperate attempt to get David Milgaard out of jail. David Milgaard was out of jail and this was all about grubbing for money.
- Q. And what about the fact that the request was made to the Federal Minister?
- A. Well, they obviously knew that if they slandered officials in the provincial government, particularly the premier, that they weren't likely to get much sympathy out of us.
- Q. Can we just go to the next page of this statement, and I take it, Mr. Brown, did you have an opportunity to review this statement and consider what was in this statement and to determine whether it had credibility?
- A. Yes, I looked at the statement and I listened to what was said at the press conference, and it was just – it was outrageous. The notion that some file clerk would be in on what was going on in the office of the Attorney General or the deputy Attorney General, the fact that they would so blithely slander these people by suggesting that they were involved in some kind of cover-up was, in my view, just outrageous and showed a degree of malice that I didn't think was there at that point.
- ...

It just struck me that the whole thing was so sleazy and so corrupt that they really had reached a new low. As I said, I was prepared to forgive the nonsense that went on before on the basis that David Milgaard was in jail and getting him out, getting his freedom was a strong source of motivation, but David Milgaard was out now, this wasn't about getting him out and, frankly, it wasn't about clearing him, it was about getting compensation package from the Government of Saskatchewan, and apparently they were willing to do anything or say anything to get that.

- Q. Did this Breckenridge incident, if I can call it that, did that change the way that you dealt with the matter from that point on?
- A. From that point on, had they marched in with the Pope and a stack of affidavits indicating misconduct, I wouldn't believed a single word of it.
- Q. And why is that?
- A. Because, as I say, at this point, it became clear that they were prepared to do or say anything that would get them closer to the compensation package they were after and the truth wasn't something they were going to be worried about.⁵⁶⁰

3. RCMP Investigation (Flicker)

(a) Introduction

The matters raised in Wolch's September 16, 1992 letter to the federal Minister, and the allegations publicized by Joyce Milgaard and Wolch on September 19, 1992 prompted Saskatchewan Justice to direct the RCMP to conduct a criminal investigation into the allegations. Saskatchewan Justice officials were the subject of the investigation so the RCMP were asked to report to Alberta Justice to ensure fair and impartial handling of the matter.

The RCMP considered Wolch to be the complainant in this investigation. Wolch and Joyce Milgaard were interviewed by the RCMP at the outset to obtain particulars of the Breckenridge allegations and to identify any other complaints. Following these interviews, the Breckenridge allegations were expanded and 68 other matters were identified for investigation by the RCMP.

Sawatsky, the assistant commanding officer of the Regina subdivision, was appointed to lead the investigation. He assembled 10 RCMP officers, and over the next two year period conducted an extensive investigation into the allegations of wrongdoing.

The RCMP report, finding no evidence of wrongdoing, was delivered to Alberta Justice in February 1994. Alberta Justice reviewed the RCMP report and then prepared its own report to Saskatchewan Justice on August 15, 1994. The Alberta Justice report concluded that there was no credible evidence of wrongdoing by anyone involved in the investigation and prosecution of Milgaard, and no basis for any charges. The Alberta Justice report was released to the public on August 16, 1994. The lengthy report produced by the RCMP was made public on July 12, 1995.

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T38072-T38074; and T38079-T38080.

(b) Scope of Investigation

The terms of reference for the RCMP investigation were very broad, and included investigation of alleged criminal wrongdoing in every aspect of the Milgaard and Fisher cases. The RCMP investigated whether any police officer, Crown official or anyone else involved in the Milgaard or Fisher matters committed the criminal offence of obstruction of justice. At the request of Wolch, the RCMP expanded their investigation to include investigation of conduct that was a breach of a provincial statute such as the *Law Society Act* or ethical duties owed by Crown counsel.

Although the purpose of the RCMP investigation was not a reinvestigation into the death of Gail Miller, it effectively became just that due to its broad scope. As stated in the RCMP report:

Our purpose was not to reinvestigate the murder of Gail Miller however, any evidence or leads implicating David Milgaard, Larry Fisher or some unknown individual resulting from this investigation were to be carefully examined and thoroughly documented.

Any new evidence or information emanating from our inquiries would be directed to the police force with jurisdiction.

A narrow interpretation of the scope of this investigation might have deprived us of relevant information. Too broad an approach would have resulted in our involvement with issues totally outside of our mandate. We decided to gather sufficient information to enable us to obtain a comprehensive understanding of all the factors involved. The result of this approach was that we investigated material/issues which were 'incidental or relating to the specific terms of reference'.⁵⁶¹

The first complaint of criminal wrongdoing having originated with Wolch, the RCMP met with him, Rodin and investigator Bruce. Asper had left his law practice in June 1992 and was not directly involved in the RCMP investigation. The RCMP asked for all of the allegations of cover-up and wrongdoing that they wished to have investigated. The RCMP also met with Joyce Milgaard for a day, asking her to identify all of the allegations of wrongdoing she believed warranted investigation. The primary focus of the investigation related to Saskatoon Police officers, Caldwell, Kujawa and as well those implicated in the Breckenridge matter.

(c) The Investigation

The RCMP investigation involved 10 officers working full time. Over 50 boxes of documents were collected and reviewed. Officers interviewed over 250 individuals across Canada.

The complaints made reflected obstruction of justice under the *Criminal Code*:

Section 139

Everyone who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding is guilty of an indictable offence.

The criminal investigation was focused on the conduct of the Saskatoon Police and its individual officers, and upon Caldwell, Kujawa and other members of the Department of Justice, including Romanow. Some

allegations alleged criminal conduct by others. For example, Joyce Milgaard alleged that Caldwell and Tallis conspired to deliberately convict her son. This necessitated a criminal investigation of wrongdoing of Tallis, by this time a judge.

Joyce Milgaard told the Commission that the Flicker investigation fell short of her expectations and was not as good as an inquiry. It did not provide a basis for exoneration or compensation.

(i) The Michael Breckenridge Allegations

Sawatsky reported that none of the people interviewed by the RCMP corroborated Breckenridge.

In Sawatsky's interview of Wolch on November 26, 1992, Wolch was quick to point out that he never talked to Breckenridge and he considered him to be the "least important bit of evidence that we have".⁵⁶²

On December 23, 1992, Breckenridge wrote to Wolch enclosing the first part of a book that he was writing:

I have marked the section that is of particular interest to you and David Milgaard. If we can release this information I am sure it will help increase public pressure to secure David a financial settlement.

I would hope that I could count on your help to get this book published.⁵⁶³

The RCMP Flicker investigation found that Breckenridge was a Clerk II in the Attorney General's Department from October 3, 1973 to June 29, 1975. Sawatsky wrote:

The information supplied by Michael Breckenridge does not support the allegations. The 'Milgaard/Fisher' cases were processed and finalized between 1969 and 1971 but Breckenridge was not employed there until 1973. He claims to have initialled and put away correspondence on an ongoing basis, yet this is not substantiated by our findings.

The people with whom Breckenridge worked do not corroborate his claims of closed door meetings and discussions about a connection between the Milgaard and Fisher cases.
...

The issues raised by Breckenridge formed the basis for our investigation, i.e. wrongdoing and obstruction of justice by former officials of the Department of the Attorney General. Yet, once the investigation was ordered, Wolch rejected the value of what Breckenridge had to offer.

In addition, during the Milgaard press conference, it was made clear that they had confirmed Breckenridge's employment with the Department during the period in question. This was extremely misleading. The best that can be said about this comment is that perhaps it was an inference drawn from Breckenridge's statement, however, given the obvious confused nature of Breckenridge's allegations the use of his material was inappropriate and it was a misrepresentation of the facts.⁵⁶⁴

562	Docid 023046.
563	Docid 159542.
564	Docid 023167.

The Deputy Attorney General of Alberta described Breckenridge's allegations as absurd.

(ii) Saskatoon City Police

The RCMP investigated 15 complaints involving the Saskatoon Police, including some made by Wolch and Joyce Milgaard:

The substance of Mr. Wolch's complaint of a cover-up against the Saskatoon Police Department as investigators is that when they learned in October of 1970 Larry Fisher was responsible for a number of sexual assaults occurring close to the time of the Miller murder, they chose to ignore the obvious link between Fisher and Miller's murder for which David Milgaard was convicted. The other allegations he and his associates pose concerning the police investigation go beyond this suggesting the police coerced witnesses and concocted much of the case against David Milgaard because of intense pressure to solve the crime. If true, these allegations would mean that the police conspired from the outset of the Miller murder investigation to wrongfully convict David Milgaard and that when Larry Fisher was apprehended they continued to cover-up the facts indicating he was actually responsible.⁵⁶⁵

Another allegation from Wolch and Joyce Milgaard was "during their 1980 investigation of David's conviction, members of the Saskatoon City police told witnesses that they should not speak with the Milgaard family and investigators. It is suggested that this was part of their attempt to ensure a cover-up of information relating to Milgaard's wrongful conviction and Fisher's guilt."⁵⁶⁶

The Alberta Justice report recorded specific allegations involving the Saskatoon Police:

- It is alleged the person responsible for the so-called "Fisher rapes" committed the Miller murder, and the police knew this and knew that person was not Milgaard, but charged and prosecuted Milgaard while knowing he was innocent.
- It is alleged that numerous witnesses who gave inculpable evidence at the Milgaard trial were told what to say by police investigators.
- That Saskatoon Police failed to investigate Linda Fisher's statement in 1980 suggesting Fisher may have murdered Miller.

The RCMP report concluded:

Our review of the Saskatoon Police investigation indicates they undertook a thorough and complete investigation of the murder using every means at their disposal to collect evidence, to locate witnesses and to identify suspects. Clearly this process involved an exploration of a possible connection between unsolved sexual assaults and the Miller rape/murder because some similarities existed between them. The police had exhausted all leads when Albert Cadrain came forward to implicate David Milgaard. Subsequent interviews of Wilson and John resulted in sufficient evidence to charge Milgaard.

The greatest concern expressed by Mr. Wolch about the evidence obtained from John and Wilson is that they initially denied involvement and later, after extensive interrogation,

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implicated Milgaard. Although both were obviously reluctant to assist the police in their efforts, we found no evidence to verify the claim that their statements were fabricated ...

In October of 1970, when Larry Fisher was apprehended for offences in Manitoba, he confessed to sexual assaults he committed in Saskatoon. Since his crimes were similar in certain respects to the Miller rape/murder, Mr. Wolch contends the police ought to have (and did) realize he was responsible for this crime too. Our findings do not support this view. We believe the facts show that once Milgaard was implicated by his friends, and once it was determined that he didn't commit the other sexual assaults the police saw his crime and Larry Fisher's crimes as separate matters.

...

The facts, as we understand them, do not support allegations of wrongdoing by the Saskatoon Police.⁵⁶⁷

(iii) T.D.R. Caldwell

Wolch and Joyce Milgaard alleged that Caldwell improperly concealed the facts during his prosecution of Milgaard, particularly his knowledge of the similarity between Fisher's crimes and the Miller murder which he failed to disclose to the defence. It was further alleged that he "withheld evidence"⁵⁶⁸ including the fact that Milgaard was not in the vicinity at the time of the murder.

The RCMP report said:

Mr. Wolch suggests the real wrongdoing with respect to disclosure occurred outside of the trial setting when it became apparent that Larry Fisher was responsible for the four sexual assaults occurring in Saskatoon near the time of the Miller murder. It is alleged that Caldwell, knowing what he did about the similarity between the various offences, ought to have realized Fisher was likely responsible for the Miller murder. He should have then taken steps to disclose the facts and reopen the Milgaard case.

Caldwell's role in facilitating the disposition of Fisher's charges in Regina was a minor one...⁵⁶⁹

In the RCMP interview with Joyce Milgaard on February 25/26, 1993, she indicated that in an earlier interview conducted by Carlyle-Gordge, Caldwell had made comments that he and Tallis "put him away together".⁵⁷⁰ She took this as collusion on the part of Caldwell and Tallis at Milgaard's trial, and said that he was given only a token defence. As a result, the RCMP investigated Tallis for the criminal offence of obstructing justice by deliberately conspiring with the Crown prosecutor to provide his client with a token defence.

As Sawatsky told the Commission, this necessitated an RCMP interview of Tallis, then a sitting judge of the Saskatchewan Court of Appeal, warning him that he was a suspect in a criminal offence of obstruction of justice.

567	DocId 023167.
568	DocId 023167.
569	DocId 023167.
570	DocId 331214.

The taped conversation that Joyce Milgaard was relying upon, related to a completely unrelated case where Caldwell and Tallis had worked on separate prosecutions of the same individual. It had nothing to do with Milgaard. The complaint was unfounded.

The specific offences that the RCMP investigated involving Caldwell were set out in the Alberta Justice report:

1. It is alleged that Caldwell consciously connected the Miller murder with the unsolved sexual assaults and failed to disclose to Milgaard's counsel any details of these alleged defences.
2. It is alleged that Caldwell destroyed a portion of his file in order to further the "cover-up".
3. It is alleged that Caldwell may have authored the five page police report (investigation summary) which was used to engineer the witness statements from John and Wilson.
4. It is alleged that Caldwell seemed to be unusually motivated in writing to the National Parole Board about Milgaard.
5. It is alleged that there was collusion on the part of Caldwell, Tallis and the Saskatoon Police and that since there was an assumption of Milgaard's guilt, he was given only a token defence.

The RCMP found no evidence of wrongdoing on the part of Caldwell.

(iv) Serge Kujawa and Saskatchewan Department of the Attorney General

The allegation was that Kujawa and the Attorney General's office took "specific and unusual actions to prevent public awareness of Fisher's crimes" by covering them up. This allegation was based primarily on the information from Breckenridge.

In their report, the RCMP described the allegations against Kujawa:

The allegations against Mr. Kujawa are to the effect that based on his handling of both the Milgaard appeal file and Fisher's rape charges, he had knowledge of the similarities between the circumstances of the Miller murder and those offences committed by Larry Fisher. The similarities were such that Kujawa obviously realized that doubt was cast on the legitimacy of David Milgaard's conviction. He is said to have engaged in closed door meetings with other officials, ie Messrs. Romanow and Lysyk, to discuss the situation following which steps were taken to discourage employees such as Michael Breckenridge from speaking about the cases. His use of a direct indictment to dispose of the Fisher rape charges was alleged to be evidence of his attempt to avoid publicity and public awareness of the Fisher crimes.⁵⁷¹

The specific offences that the RCMP investigated against Kujawa and other members of the Department of Justice including then Attorney General Romanow, were set out in the Alberta Justice report:

1. It is alleged that Kujawa sought a direct indictment against Larry Fisher and prosecuted Fisher in Regina to avoid publicity and thereby continued a cover-up of the miscarriage of justice against Milgaard.
2. It is alleged that Kujawa (then the Director of Public Prosecutions for Saskatchewan), Lysyk (then Deputy Attorney General of Saskatchewan) and Romanow (then Attorney General of Saskatchewan) connected the Milgaard file with the Fisher file and knew that there was a miscarriage of justice.

The RCMP report concluded:

Our investigation establishes that the source of these allegations, Michael Breckenridge, is not a reliable nor, for that matter, a very credible witness. His information is disputed by not only the other employees but by the facts concerning the period during which he was employed in the Department.⁵⁷²

Alberta Justice concluded that the Breckenridge allegation "appears to be absurd"⁵⁷³ and concluded that there was no evidence to support the allegations against Kujawa or any other members of the Saskatchewan Department of Justice, including then Attorney General Romanow.

Despite the extensive police investigation, the RCMP found no evidence whatsoever of any wrongdoing on the part of the Saskatoon Police, Caldwell, Kujawa or anyone associated with the Attorney General of Saskatchewan.

(v) David Milgaard/Larry Fisher Evidence

Although Gail Miller's death was not the focus of their investigation, the RCMP review covered all of the evidence which existed at the time of Milgaard's conviction, as well as information discovered subsequently. A year earlier, the Supreme Court had concluded that based on the evidence presented at the Reference Case, Milgaard had not proven his innocence. The RCMP concluded, based on its investigation, that there was no new evidence which would exonerate Milgaard, or that would inculpate any other person including Fisher.

The essence of the report, said Sawatsky, was that there was no new information apart from that heard by the Supreme Court, or which was already known to authorities. The RCMP found nothing to change the Supreme Court finding that Milgaard had not established his innocence. He acknowledged that at the close of the investigation, he was of the view that Milgaard was responsible for the murder.

Part XIV – DNA Summary – 1987 to 1997

1. Introduction

DNA testing was used in 1997 to link semen found on Gail Miller's clothing to Fisher. In the 10 years prior to the successful test, there were a number of attempts to analyze substances on the trial exhibits to eliminate or match suspects. DNA technology was an evolving science that became prevalent in the late 1980s, with its first use in a criminal matter in England in 1987.

There were two challenges in the early use of DNA technology, particularly when examining 20 year old evidence. Scientists needed a sufficient quantity of biological material to be able to extract enough DNA for testing. Secondly they needed a precise comparison tool. As technology relating to these aspects improved, scientists were eventually able to extract a useable DNA profile from the semen on Miller's clothing and compare it to the profiles of Milgaard and Fisher.

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The first attempt at DNA testing was in 1987 when Ferris examined Miller's panties and identified the presence of DNA. He could do nothing further, however, due to limitations in the techniques available at the time. A portion of the sample was destroyed in the extraction process.

After Ferris' attempt, Williams investigated the prospect of DNA testing in 1989 when the first application for mercy was received. His advice from experts at the time was that technology had not advanced to the point where such an old sample could be tested.

When Milgaard's case was referred to the Supreme Court of Canada on November 28, 1991, federal and provincial authorities again considered the feasibility of DNA testing. The science had progressed and clear results either eliminating or identifying David Milgaard as the donor of any remaining semen would be determinative in the s. 690 proceedings.

Federal Justice obtained the original exhibits from the Miller murder trial and Williams asked Alain of the RCMP Central Forensic Laboratory to conduct an examination of Miller's clothing to determine the presence of biological material suitable for DNA analysis. Alain detected only a small semen stain on the panties. Due to the testing methodology used and the lab condition, Alain did not identify more extensive staining elsewhere on the panties and Miller's dress. As a result, the parties believed that only a microscopic specimen was available for analysis, and feared that it might be entirely consumed in the process of further testing so the testing options were significantly restricted.

When the exhibits were finally submitted to the Forensic Science Service laboratory in England in 1997, additional and abundant semen staining was located on the panties and the dress and conclusive results were obtained which eliminated Milgaard as the donor, and identified Fisher as the source.

2. Identification of Suitable DNA

During the Supreme Court Reference Williams asked Alain to examine the Miller murder exhibits for the presence of biological material suitable for DNA analysis.

Alain conducted the tests and provided a report to Williams dated February 17, 1992 which confirmed that she had examined Miller's panties, her girdle with mesh stockings, the vials of substance and the toque for material suitable for DNA analysis. She testified at the Inquiry that she also examined the dress, with negative results. Her original report concluded that only a single small semen stain was located on the panties.

Rather than testing the entire surface of the garments for semen, which was a common practice at the time, Alain only tested random portions of each of the items. She explained that there was no active serology lab in Ottawa at the time, and she took this approach because of limited equipment. There were RCMP serology labs operating in other jurisdictions but Williams wanted the testing done in Ottawa. Alain thought that the random testing method would be adequate.

Paynter testified at the Inquiry that the full mapping technique (testing the entire garment) had been used by the RCMP lab in Saskatchewan for several years prior to 1992. Senior forensic scientist Barber, of the Forensic Science Service in England stated that the English lab had been using the full mapping technique well prior to 1992 as well.

Alain did not detect the semen staining on the dress nor the further staining on the panties that was discovered in 1997.

3. DNA Testing – 1992 to 1994

Alain's February 17, 1992 report set out several DNA testing options for the remaining stain although after further consideration, Gaudette, Chief Scientist of the Biology section of the central lab, recommended that none of the options be pursued given their respective drawbacks. The concern remained that the last remaining sample would be destroyed without useful results.

On March 9, 1992, Fainstein advised the Supreme Court of Canada that DNA testing of the relevant exhibits had not been performed because new technology had not proceeded far enough to provide conclusive results. Fainstein asked for the Court's permission to retain the material until DNA testing had advanced further.

Later that month, another testing option had been identified and Fainstein informed Reference counsel that the option would be pursued. Exhibits were transported to Roche Biomedical Laboratories in North Carolina and the small stain from the panties, and one of the vials of substance from the original trial were examined. The lab was unable to obtain conclusive results, however, and further testing was halted due to the state of the samples and the continuing fear that they would be consumed without useable results. The exhibits were returned to Ottawa.

Fainstein updated the Supreme Court on April 6, 1992 during final submissions, advising that the recent attempts at DNA testing had not succeeded due to the age and condition of the material.

The key exhibits remained in Ottawa following the conclusion of the Reference Case and Fainstein and others maintained an interest in the prospect of further DNA testing. The issue took on renewed relevance during the Flicker investigation conducted by the RCMP in 1993. The continued assumption, however, was that only a very small amount of biological material was available for testing, and attempts were again deferred pending further advances in technology.

4. DNA Testing – 1995 to 1997

In early 1995, DNA discussions resumed and Fainstein told the parties on March 30, 1995 that Federal Justice was prepared to proceed with testing, provided that everyone could agree to an approach. Discussions ensued including a lengthy debate between Milgaard's counsel and counsel for the federal Department of Justice and Saskatchewan Justice on who should do the test, and on the appropriate DNA methodology.

Proposals were exchanged with each side relying upon the advice of their experts. Milgaard's expert, Dr. Edward Blake, suggested that a fresh review of the evidence would be appropriate. The parties agreed, but differed over several other points.

An agreement was finally reached in April, 1997 after approximately two years of communications. The relevant evidence would be submitted to the Forensic Science Service lab in England for designated DNA testing, with experts in attendance on behalf of the Federal Crown and David Milgaard, to observe and provide assistance if requested.

5. The DNA Results

DNA testing was conducted by the Forensic Science Service lab in Wetherby, West Yorkshire between July 14 and July 18, 1997. Barber provided an interim report dated July 18, 1997 confirming that additional and ample semen staining had been located on the panties and the dress and that extracts had been tested. The generated profile was then compared against known samples from Gail Miller, Milgaard and Fisher.

The report concluded that the semen found on the panties and the dress could not have originated from Milgaard. It further concluded that Fisher could not be excluded as the source of the semen on the panties and the dress, and that "(b)ased upon data collected from the UK Caucasian population the STR profile obtained from the semen stains and from Larry Fisher's blood sample is estimated to occur at a frequency of approximately 1 in 400 million men".⁵⁷⁴ Essentially, a match had been identified.

A news release was issued on July 18th by the federal Minister of Justice confirming that the DNA results had been received, and that they showed that a terrible wrong had been done to David Milgaard by his wrongful conviction. The Minister expressed her deepest sympathies and regret. The Saskatchewan Minister of Justice also apologized to David Milgaard and his family for his wrongful conviction.

6. DNA Testing in the Case Against Larry Fisher

Fisher was arrested and charged for the rape and murder of Gail Miller on July 25, 1997, and a DNA warrant issued to obtain fresh biological samples from him. With the samples and exhibits in hand, the RCMP Central Forensic Laboratory completed its own DNA testing.

Elizabeth Charland of the Central Forensic Laboratory oversaw the testing process and submitted a Forensic Laboratory Report dated January 13, 1998. The report concluded that the DNA profiles generated from stains on the panties and the dress matched the profile obtained from the known Larry Fisher sample.

Charland also tested a previously untested stain on one of Gail Miller's gloves. As Charland reported to the Inquiry, the substance on the glove was not confirmed to be blood. Charland explained that the major (most significant) portion was consistent with Gail Miller's DNA profile, and one could therefore conclude that it was likely Gail Miller's biological material. Charland also identified a component of male origin with limited information. She could not say what particular biological material the stain consisted of i.e. blood or skin or semen, and there was insufficient information to match it with a donor. She reported that she could not exclude Fisher as the donor, but certainly could not identify him either.

The glove stain was not detected during the original investigation and trial, nor in any post conviction review. Questions arose at the Inquiry as to whether forensic analysis of the glove stain could have provided a basis to eliminate Milgaard as a suspect at trial or in the post conviction review.

The simple answer to this question is no. The male portion of the stain discovered by Charland was minute, and was mixed with the larger Gail Miller portion. Even if it had been found, it could not have been confirmed as blood, nor could it be determined that the donor of the male stain was Miller's assailant. There was no evidence that the stain was deposited on the glove during the attack by the assailant. It was possible that the male portion of the stain was deposited on the glove prior to the attack, and was unrelated to Miller's murder. There was no scientific basis to determine the timing of the deposit.

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If the male stain was blood from the assailant and had been discovered, forensic analysis of the blood in 1969 could have provided a basis to exclude a suspect as a donor of the blood, in a manner similar to how the A antigens in the semen were used to eliminate donors with different blood types. There were test procedures available in 1969 that, in some cases, provided a basis to distinguish between donors of the same blood types by means of their sub-types (eg. between two A secretor donors). The analysis could not be used to identify the donor, and was limited to eliminating donors of a certain blood type or sub-type.

It is not possible at this stage to determine whether such testing could have eliminated Milgaard as the donor of the male stain. Even if he had been eliminated as the donor, he would not have been eliminated as a suspect, because the stain could not be conclusively linked to the assailant.

If the glove stain had been detected and analyzed in 1969, the testing would not likely have eliminated Milgaard as a suspect, but might have produced relevant evidence. However, any conclusions on the stain's forensic value in 1969 or during the review are entirely speculative.

7. Concluding Remarks

There was abundant DNA on the original Gail Miller murder exhibits which would have allowed for more conclusive testing as early as 1992. The full extent of the staining was missed, however, during Alain's review of the exhibits, and the parties relied upon her conclusions for several years to follow.

The additional staining could have been discovered in full if the items had been sent to an active RCMP serology lab in 1992. If so, Barber confirmed that DNA testing on the larger samples would have likely produced suitable results in 1992, demonstrating that the semen on the dress and panties did not originate from David Milgaard. The power of these tests, however, to connect the samples to Larry Fisher as the donor would have been much more limited until at least August, 1994 when DNA testing had progressed further.

The delay is understandably troubling from the Milgaard perspective, but as well from the public's point of view, as Fisher was at large during a portion of the interim period. The matter is considered again in a later section of this report.

Part XV – Reopening of the Investigation into the Death of Gail Miller

On July 18, 1997, after receiving the DNA results, the Saskatchewan Minister of Justice and the federal Minister of Justice apologized to Milgaard for his wrongful conviction.

Saskatchewan Justice wrote to the Saskatoon Chief of Police on July 18, 1997 advising that "after considering the matter, it is my opinion there exists reasonable and probable grounds to believe that Larry Fisher committed the murder of Gail Miller. On the basis of this there appears to be a reason to arrest and charge him with non-capital murder".⁵⁷⁵

On July 21, 1997, Saskatoon Police advised Saskatchewan Justice:

In light of the developments surrounding this file, we are requesting that the Department of Justice appoint another agency to investigate the death of Gail Miller.

This police service is in favour of such an agency being appointed and will cooperate and provide assistance to every extent possible, including providing access to the original file.⁵⁷⁶

Saskatchewan Justice asked the RCMP to investigate Gail Miller's death and Fisher's involvement in that death.

July 21, 1997 marked the reopening of the investigation into the death of Gail Miller.

On July 25, 1997, Fisher was charged with the rape and murder of Gail Miller.

His preliminary inquiry commenced on January 12, 1998 and was held in Provincial Court in Saskatoon, Saskatchewan. On August 26, 1998, he was committed to stand trial on both charges.

Evidence of three of Fisher's seven previous convictions for sexual assault were allowed as similar fact evidence. This, together with DNA evidence was offered by the Crown as proof of the identity of Gail Miller's murderer and that was the main trial issue.

On November 22, 1999, the jury found Fisher guilty of the murder of Gail Miller. On January 4, 2000 he was sentenced to life in prison. His appeal to the Saskatchewan Court of Appeal was heard on April 15, 2003 and dismissed on September 29, 2003. Leave to appeal to the Supreme Court of Canada was denied on August 26, 2004.

Chapter 4

Executive Summary

1. Chronology

David Milgaard, Nichol John and Ronald Wilson set out from Regina to Saskatoon in the early morning hours of January 31, 1969 in Wilson's car, stopping once along the way to break into a grain elevator. The trio arrived in Saskatoon before 6:45 a.m. and drove around looking for the home of a friend, Albert (Shorty) Cadrain, whose house was located on Avenue O south of 20th Street. Sometime between 7:00 a.m. and 7:30 a.m. they stopped at the Trav-A-Leer Motel on the west central edge of Saskatoon. David Milgaard entered in his stocking feet, asking for a map. The Wilson car was next seen in an alley behind the Danchuk residence around 7:30 a.m. or 7:40 a.m. The Danchuk residence was between the Trav-A-Leer Motel and the crime scene, closer to the latter. Milgaard, John and Wilson had become stuck in the alley behind the Danchuks' car and waited there until well after daylight when a tow truck freed their car and took them to a garage. From there, they made their way to the Cadrain residence then to another garage, leaving Saskatoon in the afternoon with Albert Cadrain. Over the course of about a week, they traveled to Calgary, Edmonton, St. Albert, Banff and Regina, where they parted company.

Gail Miller was sexually assaulted¹ and murdered on January 31, 1969. Her body was found in a Saskatoon alley around 8:30 a.m. She was last seen around 6:45 a.m. in her rooming house, about one block away.

Within the previous four months, three other women had been sexually assaulted in Saskatoon, two within 12 blocks of the Miller crime scene.

As reported to police, another young woman, Victim 12, was sexually assaulted on January 31, 1969, about six blocks from the Miller crime scene. In the terminology of the day, it was an indecent assault.

Larry Fisher lived in the Cadrain house about two blocks south of the murder scene, also in the general area of two of the sexual assaults.

David Milgaard was in the area of the murder scene around the time of death.

He was questioned on March 2, 1969, released on March 3, arrested on May 30, 1969, and convicted of the murder of Gail Miller on January 31, 1970.

He served 23 years of a life sentence before being released on April 16, 1992.

On February 21, 1970, another sexual assault was committed in west Saskatoon.

In August and September of 1970, Fisher committed two sexual assaults in Fort Garry, Manitoba. By December 21, 1971, he had been convicted of these and the four Saskatoon sexual assaults noted above, except for the indecent assault and the Gail Miller rape and murder. Ten years later he was convicted of rape and attempted murder in Prince Albert, Saskatchewan for an offence committed in North Battleford.

In 1992, following a reference to the Supreme Court of Canada, the Minister of Justice set aside David Milgaard's conviction and ordered a new trial. The Province of Saskatchewan declined to prosecute, entering a stay.

In 1997, DNA from semen samples found on the clothing of Gail Miller was tested and matched that of Larry Fisher, but not David Milgaard.

Fisher was charged for the rape and murder of Gail Miller and was convicted on November 22, 1999. His appeal to the Saskatchewan Court of Appeal was dismissed on September 29, 2003, and his application for leave to appeal to the Supreme Court of Canada was dismissed on August 26, 2004.

On July 18, 1997, the Government of Saskatchewan apologized to David Milgaard for his wrongful conviction, and on September 9, 2004, acknowledged that he was factually innocent of the charge that he murdered Gail Miller, and that he was wrongfully convicted of a crime he did not commit.

2. Saskatoon Police Service

The investigation of the Gail Miller murder was done by the Saskatoon Police assisted, in its initial stages, by the RCMP with incidental help by the Regina Police and Calgary Police.

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In 1969 and 1970 sexual assaults were particularized as, for example, rape and indecent assault. The modern usage in the *Criminal Code* employs a generic term, "sexual assault", and this usage will be applied here except when recording convictions where a specific crime will be identified.

In general, the Saskatoon Police investigation was thorough and followed acceptable procedures. There was, however, a critical failure to record the circumstances surrounding the questioning of John and Wilson by their agent, Roberts of the Calgary Police and, in John's case, by Mackie as well. Many years later, Saskatoon Police failed to follow up on a report that Fisher and not Milgaard might have been Gail Miller's killer.

3. RCMP Investigation

The RCMP gave full time assistance to the Saskatoon Police for three months from the day of the murder. Both forces devoted important resources to the investigation.

4. Scene Investigation

The scene investigation by Penkala and Kleiv and other officers was thorough and performed under trying circumstances, given the extreme cold.

5. Autopsy

The victim died from a stab wound which penetrated her lung. There were 11 other stab wounds on the upper body and her throat had been slashed several times.

Vaginal aspirate was drawn from the victim, found to contain non-motile spermatozoa, and discarded.

6. Canvass of Neighbourhood

There was a prompt and concerted effort by police, including an organized interview of persons living or found within the four to six block radius of the crime scene.

7. Questioning of Gail Miller's Friends and Others

The investigation initially focused on Gail Miller's friends, roommates and male acquaintances.

Some witnesses saw activity in the area of the crime scene at relevant times, while others saw nothing. In evaluating their evidence it is important for us, as it was for the jury, to remember that until around 7:30 a.m. it was dark, bitterly cold (-41 C), with ice fog which obscured visibility to a marked degree.

8. Forensics

Forensic evidence was collected from the victim and the crime scene. Although introduced at trial, serological evidence played little part in the conviction. DNA typing as a forensic tool was unavailable in 1970, but semen stained clothing was among the trial exhibits preserved. Twenty-seven years later, DNA was successfully extracted from these stains and typed in England. David Milgaard was excluded as the donor and consequently exonerated of the murder. A match with Fisher was found and served as the basis for his conviction as the killer of Gail Miller.

The RCMP analyst noted semen stains only on the panties of the victim in 1969 and a different analyst did the same in 1992, although they were present on the dress and the coat, as finally found in the United Kingdom's Forensic Services Laboratory in 1997, where DNA was successfully extracted and typed. The technology for doing this was not available prior to Milgaard's conviction.

9. Suspects and Theories

Saskatoon Police reasonably made no connection between an indecent assault which occurred at 7:07 a.m. at a spot eight minutes walking distance from where Gail Miller was killed.

Fisher, unknown to police at the time, had committed two rapes and an indecent assault in the fall of 1968 in the general area of the murder. Although a possible link between the murder and the 1968 rapes was considered, police had no suspect for either the rapes or the murder until Milgaard came to their attention on March 2, 1970, as being connected to the murder but not the rapes. Saskatoon Police attention thus reasonably became focused on him as the murderer, and investigation of the rapes was left in abeyance.

10. Albert Cadrain's Statement to Police

A key witness at the Milgaard trial was Cadrain who died in 1995.

On March 2, 1969, he gave a statement to Saskatoon Police implicating Milgaard in the murder of Gail Miller. The statement played a major role in the direction of the investigation. He reported that Milgaard arrived at his home (which was within two blocks of the crime scene) around 9:05 a.m. in the morning in a nervous state with blood on his trousers and shirt, which he changed for other garments at Cadrain's house.

No police pressure was exerted upon Cadrain to implicate Milgaard, but police vigorously challenged Cadrain upon the truth of his statement implicating Milgaard. Cadrain never recanted what he had told to the police about seeing blood on Milgaard.

Although Cadrain later suffered mental illness, it was not apparent when he gave his statement of March 2, 1969, to police nor to the prosecutor at the preliminary inquiry or trial of David Milgaard.

11. Ron Wilson Questioning

With Milgaard on the morning of January 31, 1969, were Wilson and John. Wilson was interviewed by police on March 3, 1969, and provided an alibi for Milgaard saying that he was with him at all relevant times except for a few minutes. Police suspected that Wilson had not given them the whole story and interviewed him again on May 21, 1969, at which time he began to implicate Milgaard in the murder. He was taken to Saskatoon for a polygraph examination and there he further implicated Milgaard. Following the polygraph session, Wilson gave a sworn statement to Saskatoon Police and, consistent with it, testified at trial for the Crown. Some 20 years later he was to recant parts of his incriminating statement against Milgaard, but he conceded at the Inquiry that he had not been intimidated by the police or by the prosecutor.

Police checked his veracity insofar as they could and acted reasonably in submitting his evidence to the prosecution. Caldwell, in turn, was justified in putting Wilson forward as a credible witness.

12. David Milgaard Questioning

Milgaard was interviewed on March 3, 1969, by Karst who found his answers to be too vague, calling for further inquiries. Although known to have been in the general area of the crime at relevant times, Milgaard was unable to account for the period of time which could have included the murder. This is not intended as a criticism of Milgaard, who had the right to remain silent. It is simply noted in connection with the reasonableness of police in continuing their investigation of him.

13. Nichol John Questioning

John gave an initial statement to police on March 11, 1969. At least one policeman, Karst, thought that she might be telling the truth when she said that Milgaard could not have committed the offense, but the consensus among investigators was that she had not told the whole truth and they resolved to have her, as well as Wilson, examined by a polygrapher in Saskatoon. This was done on May 23, 1969, although the polygraph test was not administered to her because she gave what polygrapher Roberts regarded as the truth to him orally. She was turned over to Saskatoon Police who took her statement the next day, May 24, 1969, under oath.

John has never alleged that she was coerced to make her May 24, 1969, statement which put Milgaard at the scene of the murder, stabbing a woman. At both the preliminary inquiry and the trial she professed not to remember witnessing a stabbing. Her statement to police, however, was before the jury at the trial, for the purpose of testing the credibility of her trial testimony that she could not remember the most incriminating parts of her statement to police. The jury was cautioned that, because she did not adopt those incriminating parts of her statement, they could not be used for truth of content. Whether the jury obeyed their instructions cannot be known with certainty, but reliable evidence at the Inquiry invites the conclusion that they did not.

14. Questioning of Other Witnesses

A March 1969 interview of a girlfriend left police with reason to think Milgaard was a person of bad character, capable of having been involved in the murder.

Prior to May 5, 1969, Saskatoon Police visited Milgaard's parents to speak about their son as a murder suspect, and recorded his father stating that he was not surprised and suspected that something like this might happen. By May 16, 1969, Milgaard was regarded by police as the prime suspect arising from Cadrain's statement. He had to be either implicated further or eliminated, so police resolved to get the full story from Wilson and John. What they told police on May 23 and May 24 in Saskatoon provided enough evidence to charge Milgaard.

15. Motel Room Re-enactment

On the eve of trial, Sunday, January 18, 1969, Wilson reported to police that Melnyk and Lapchuk had told him that Milgaard re-enacted the killing of Gail Miller at the Park Lane Motel in Regina in early May of 1969. Police told Caldwell, who had them interview Melnyk and Lapchuk, and the two testified at trial. Caldwell immediately reported what he had heard to defence counsel Tallis. Confronted with this information by his lawyer, Milgaard could not deny that it happened, but said that he was stoned at the time and if he did anything it was a joke. Tallis could not therefore suggest to witnesses at the trial that it had not happened, but could only argue that Milgaard had acted in jest. The interpretation of the event was left with the jury to decide.

A girl who was present at the Park Lane Motel when the incident was said to have occurred, Frank, was interviewed by police, but was not called at the trial because of her highly emotional state. A second girl, Hall, could not be located.

16. Police Investigation Files Provided to Prosecutor T.D.R. Caldwell

In the practice of the day, Caldwell did not see the complete police file. He received some police reports, but not all, and reviewed 95 civilian statements at the request of defence counsel Tallis, looking for

evidence tending to show that the accused might be innocent. Caldwell's disclosure to Tallis met the standards of the day according to the Supreme Court of Canada. In the hindsight illuminated by much additional evidence heard at this Inquiry, Caldwell did not disclose some evidence from witnesses who told the police that they had seen nothing unusual in the neighborhood of the crime scene, although they were in a position to have seen activity, and he did not disclose evidence of certain sexual assaults in the area in 1968, as well as one indecent assault almost contemporaneous with the murder. Evidence of these assaults, had they been known to Tallis at the time, might have led him on lines of inquiry establishing a defence that the murder could have been committed by a third party, thus possibly raising a reasonable doubt of Milgaard's guilt. This non-disclosure was the product of an honest, if mistaken, belief by Caldwell that the evidence was not useful to the defence. By present standards, such evidence would have been disclosed as a matter of course under the *Stinchombe* standard, a fact which makes unnecessary any recommendation I might make on this subject.

17. Preliminary Inquiry

Although at the preliminary inquiry John recalled the events of the morning of the murder without reference to seeing a stabbing, there remained some evidence upon which a jury could convict and the accused was accordingly committed for trial. Prosecuting counsel prepared himself to challenge John at trial under s. 9(2) of the *Canada Evidence Act* about her May 24th statement should the need arise.

18. The Trial of David Milgaard

The premise of this Inquiry is that David Milgaard was wrongfully convicted. In its 1992 Reference, the Supreme Court of Canada was of the opinion that he received a fair trial. This opinion was based upon:

- evidence known at the time;
- argument presented at the Reference;
- deference to the findings of the jury relating to facts heard by the Supreme Court which were before the jury; and
- deference to the Court of Appeal judgment from which the Supreme Court had denied leave to appeal.

My first Term of Reference requires me to "inquire into and report on any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Milgaard...". Many issues arise, including the fairness of the trial, and I neither question nor endorse the assessment of the Supreme Court of Canada in this regard.

When the Saskatchewan Court of Appeal heard argument about the trial judge's handling of the s. 9(2) *Canada Evidence Act* matter, it decided that although a procedural error had occurred in not holding a *voir dire* on the circumstances surrounding the giving of the Nichol John May 24, 1969, statement, the error did not compromise the safety of the conviction. I have accepted evidence given at the Inquiry that the defence of David Milgaard was prejudiced by this error. This argument was not made by Milgaard counsel at the 1992 Supreme Court Reference.

There are two problems arising from the error. In the first place, the jury might never have heard the most incriminatory parts of John's May 24, 1969 statement had Tallis been allowed to probe, in their absence, the circumstances under which the statement was given to police. The second problem is the inherent prejudice to an accused in s. 9 itself. That prejudice lies in the recitation of evidence which is inadmissible for truth of contents, unless adopted by the witness, but is admissible on the issue of credibility only.

The prejudice can be avoided only by the jury heeding the warning of the trial judge to ignore the evidence for truth of contents, unless adopted. I listened at the Inquiry to credible evidence that the distinction was lost on this jury. Without direct evidence on the point, I make no finding that the jury used the evidence for truth of contents, but there is a real possibility that they did.

I reject the argument that the Crown theory, put to the jury, was impossible and should have been seen as such by the prosecution. It was a plausible theory and was presented as nothing more. The jury was instructed that it was for them to find the facts. They could have disagreed with the Crown theory and still have returned a verdict of guilty.

Tallis argued at trial that the timing of events did not support the Crown's theory and he received a favorable charge on the time issue, the judge placing the window of opportunity between 6:45 a.m. and 7:10 a.m. even though he could have extended it to 7:30 a.m. based on the evidence. The judge's tone and manner in delivering his charge were favorable. His treatment of the motel re-enactment was appropriate. David Milgaard, according to trial witnesses, Melnyk and Lapchuk, had, at a motel party, acted out the stabbing of Gail Miller.

Caldwell was properly convinced of Cadrain's credibility, and acted accordingly in putting him forward as a Crown witness.

John, while denying that she had lied in giving statements to the police, said that she had no memory of telling police the most incriminating parts of her May 24th statement.

The trial judge's interventions during the hearing of evidence hurt the defence, especially during the cross-examination of John where he effectively destroyed the credibility of her *viva voce* evidence that she could not remember the incriminating parts of her statement. In the result, the jury was likely to conclude that the truth lay in her May 24th statement.

My conclusion with respect to the conduct of the trial by Crown and Defence is that neither counsel did anything to contribute to the wrongful conviction of David Milgaard. On the contrary, Caldwell offered evidence which he believed to be credible and relevant, and did so in a spirit of cooperation with defence counsel. For his part, Tallis offered a skilled, thorough, nuanced and ethical defence.

19. Preparation for Trial by Prosecutor

Caldwell's trial preparation was based upon the police summary provided to him. It was an amalgam of known facts, allegations drawn from witness statements and informed speculation.

20. Preparation for Trial by Tallis

Tallis first met with his client, David Milgaard, on August 4, 1969, and twice more in prison before trial. He also met him daily in private during the preliminary inquiry and trial.

Tallis became aware of the Cadrain, Wilson and John statements on August 4, 1969, as well as Milgaard's statements of March 3 and April 18, 1969.

He prepared an extensive legal brief and described at the Inquiry what I find to have been a thorough preparation for trial.

Tallis' advice to his client and his conduct of the defence were founded in ethical considerations. While operating on the basis of his client's assurance that he had not committed the crime of murder, he had

to take note of certain admissions by Milgaard which were incriminating and which were reflected in the evidence called by the Crown.

Tallis advised him not to take the stand on his own behalf and Milgaard and his parents accepted the advice. It was an informed decision, based on advice from a seasoned, ethical defence counsel who had taken all relevant factors into account.

Roberts, the Calgary Police polygrapher who had heard critical oral statements (later recorded by Mackie and Karst of the Saskatoon Police) from Wilson and John, made no record of the circumstances of the taking of these statements. He presented special problems for Tallis because he was uncooperative in a pre-trial interview. Tallis concluded that he would be of no help to the defence, and that it would have been a grave mistake to call him. Denied a *voir dire* on the circumstances surrounding the taking of the John statement, Tallis could not raise polygraph issues before the jury without risk of having them conclude that the witness had passed the test.

The case was not easy to defend. Milgaard's friends had implicated him without apparent motive. Wilson tried to be convincing at trial and there was no suggestion of police pressure on him. Cadrain displayed no signs of mental instability at the preliminary inquiry or at the trial. He had reported voluntarily to Saskatoon Police.

John's evidence was pivotal, leaving the impression with the jury that she was trying to protect her friend Milgaard.

A major challenge for Tallis lay in the fact that Karst, a well respected, experienced, and forthright officer, gave important evidence for the Crown, mostly relating to Cadrain and his statement implicating Milgaard.

Tallis was well prepared to meet the serological evidence and was able to present it as being exculpatory.

Milgaard never complained to Tallis of pressure from the Saskatoon Police or of them trying to frame him.

Informed on the eve of trial about the motel re-enactment evidence, Tallis caused inquiries to be made in Regina about Melnyk and Lapchuk. He informed his client, who said that he could not recall the incident but could not deny that it happened. If it did, he said, he was stoned and joking.

In view of what his client and Frank, another witness, told Tallis, he felt that he could not suggest to witnesses that the re-enactment had not happened. His view was that Frank would not be of help as a witness.

Tallis' handling of Wilson at trial was thorough and sensitive to the many difficulties presented. Wilson's Inquiry evidence differed markedly in many respects from what he said at the preliminary inquiry and trial. He was not credible at the Inquiry. According to Tallis, the evidence of Lapchuk and Melnyk about the motel re-enactment was damaging, but had not nearly the impact of John's evidence at trial. I accept that the s. 9 *Canada Evidence Act* proceeding was instrumental in Milgaard's conviction.

David Milgaard undoubtedly re-enacted the stabbing of Gail Miller, as reported by Melnyk and Lapchuk at trial. Whether he did it as a joke was something for the jury to decide. Although they were not of good character, the Crown put forth Melnyk and Lapchuk in good faith as credible witnesses.

By most accounts available to the authorities, both before and after conviction, Milgaard was a young person of unsavory character – a fact which would give reasonable cause for suspicion. Both the police

and the prosecution would be entitled to think that what the re-enactment witnesses described was a confession to murder by David Milgaard.

I find no fault in Tallis' preparation for the preliminary inquiry and trial or in the conduct thereof. His client, David Milgaard, received an able defence.

21. Secretor Issues

Evidence relating to semen samples found frozen in the snow near the victim's body was put in by the Crown as part of the circumstances. The evidence was essentially exculpatory because the blood antigens found in the semen could only have been those of a secretor and Milgaard was thought to be a non-secretor, although the Crown left open for the jury the possibility that the accused could have been the donor through contamination with his whole blood. This conjecture was effectively discounted during the trial by lack of evidence in support, so the jury was left with exculpatory evidence as argued by the defence.

DNA typing was not available to analysts in 1969.

22. Wrongful Conviction of David Milgaard

But for the questioning of John and Wilson by polygrapher Roberts, David Milgaard would not have been charged and tried for the crime of murder.

The Government of Saskatchewan has acknowledged that David Milgaard is factually innocent of the charge that he murdered Gail Miller, and that he was wrongfully convicted of a crime he did not commit. The Commission, therefore, has accepted that the term "wrongfully convicted" as used in the Terms of Reference means that David Milgaard was found guilty of a crime which he did not commit. That crime was murder.

In her statement of May 24, 1969, John said that she saw Milgaard stab a woman. In view of the acknowledgment made by the Government of Saskatchewan and adopted by the Commission as its working premise, that cannot be true. How then did she come to say it? I do not find that she deliberately lied, and I do not find that Roberts induced her to lie, although both must be acknowledged as possibilities. We know, however, that Roberts interrogated her in the belief that Milgaard was the killer, and that he showed her the victim's bloody garment, asking what if this had been your sister? The tactic produced the desired result, by his own account in testimony before the Supreme Court of Canada. That Court, in view of what was known in 1992, was entitled to think that Roberts might have gotten the truth. I, on the other hand, must conclude that he somehow pressured John into telling him what he thought to be the truth.

Although the details of the pressure exerted are unknown, there can be no doubt that the Roberts interrogation of John led to a sworn statement which provided the basis for charging David Milgaard with murder. That it also led to his conviction is less certain, but it was a factor according to the evidence which I will review.

23. Conclusions on the Investigation and Prosecution

The investigation by Saskatoon Police and the RCMP as well as the prosecution was conducted in compliance with the standards of the day, and in good faith. There was, however, a critical failure to record circumstances surrounding the taking of Wilson and John's statements by Roberts of the

Calgary Police, and Mackie of the Saskatoon Police. Tunnel vision, negligence and misconduct have been alleged, but not shown.

Disclosure met the standards of the day, due account being taken of the prosecutor's discretion in deciding what evidence tended to show the accused's innocence. Arguably, some evidence which might have been useful to the defence was not disclosed, but the prosecutor exercised his discretion in good faith.

The trial was conducted competently and fairly by both prosecutor and defence counsel.

An error in procedure in applying s. 9(2) of the *Canada Evidence Act* made by the trial judge was deemed by the Court of Appeal as not having affected the verdict. Inquiry evidence leads to the conclusion that the defence was prejudiced by not only this error, but by excessive intervention by the trial judge when witnesses were testifying.

The patience of a trial judge is sorely tested in the court room and its occasional loss is understandable. This case, however, is a reminder to all of us who preside over trials that displays of impatience can have profound consequences.

24. Larry Fisher Chronology of Events

Sexual assaults, later attributed to Fisher, were committed in Saskatoon in the fall of 1968. He committed a further rape in 1970, in Saskatoon, after David Milgaard was convicted for the murder of Gail Miller.

Some policemen during the Miller murder investigation thought that the perpetrator of the 1968 sexual assaults might also be the murderer of Gail Miller, but the rapist was unknown to them and they finally settled on David Milgaard as the prime murder suspect. They put aside the rape files which remained unsolved, until Fisher was apprehended in Winnipeg for rape there and stated that he wanted to clear up matters from Saskatoon. Two Saskatoon officers went to Winnipeg in October of 1970 to take statements and one of them, Karst, had worked on the Miller murder investigation. He testified that he drew no connection between the rapist, Fisher, and the murderer of Gail Miller. He reported to his superiors in Saskatoon. Informations charging Fisher with the Saskatoon sexual assaults were drawn, and about a year later, in 1971, Fisher, having pled guilty to the Winnipeg rapes, came to Regina and pled guilty to the Saskatoon offences. He received concurrent jail sentences to the ones imposed by the Manitoba court for his offences there.

More than 20 years later, when Joyce Milgaard and her supporters tried to have the case reopened, Fisher became the focus of their attention, and some of the Saskatoon rape files could not be found. Thus arose the allegation by the Milgaard group of a cover-up – that Saskatoon Police and Justice officials in Saskatchewan concealed Fisher's conviction in Regina for the Saskatoon rapes so as to avoid the embarrassment of having convicted the wrong man for Gail Miller's murder.

I am satisfied from the evidence of Karst of the Saskatoon Police, Greenberg (Fisher's then defence lawyer), and witnesses then with Saskatchewan Justice such as Caldwell, Kujawa and MacKay, that no connection between the Fisher rapes and the Miller murder was drawn by police or Justice officials, which should have caused them to reopen the murder case. No Saskatoon rape files were concealed or destroyed by police or Crown officials for the purpose of concealing them lest the connection be made between those crimes and the Miller murder.

25. Caldwell's Letters to the National Parole Board

In 1972 and again in 1974, Caldwell wrote to the National Parole Board urging Milgaard's continued incarceration because of the seriousness of the crime. His letters related to Milgaard's possible parole, and not to the reopening efforts of the Milgaard group, which began only in 1980. The letters did not delay the reopening, because Caldwell was cooperative with investigators, despite being pilloried by the Milgaard group through the press. But accusations of bias against Caldwell have led investigators up many a blind alley. This Inquiry has invested much time, effort, and money on what have proven to be baseless accusations of misconduct by him. One recommendation which I would make for the better administration of justice in this province, would be that prosecutors desist from unsolicited contact with the Parole Board. If asked, they should confine recitation of the facts of a case to those found by the courts. They should avoid leaving the impression that they are heavily invested in a case on a personal level.

26. Linda Fisher's Visit to Saskatoon City Police

The third arm of the Terms of Reference directs me to seek to determine whether the investigation into Gail Miller's death should have been reopened earlier based upon information which came to the attention of the police or the Crown. The Commission interpreted "reopening" as meaning the reopening of the investigation into Gail Miller's death, which occurred in July of 1997 after DNA testing in the United Kingdom. Although the Linda Fisher report to police in 1980 predated by many years any possible recourse to DNA typing, it might have led to Fisher as a serious suspect in 1980 had it been followed up. The report was received, filed, referred, and possibly evaluated on a cursory basis within the Saskatoon Police, but it went no further. It should have.

27. Bruce Lafreniere Report to Shellbrook RCMP

It is possible that a report came to the RCMP detachment in Shellbrook, Saskatchewan in the mid-1980s concerning information to link Larry Fisher to the Miller murder. There is no documentary record of the report and the RCMP officer to whom it was supposedly made cannot remember it. The same person who claimed to have made the report to the Shellbrook RCMP, Lafreniere, used an alias, Sidney Wilson, in 1990 when he again reported to Wolch's office by telephone. This time, the report received immediate attention by authorities who were by this time engaged in the first s. 690 application.

28. Initial Steps Taken by the Milgaard Group to Reopen

The Inquiry's business, under the third Term of Reference, is to decide whether or not, on the basis of information received by the police and the Department of Justice ("Saskatchewan Justice"), the case should have been reopened earlier.

Convictions which have survived the judicial process do not attract the continued interest of police or prosecution. That will not change. Both are fully occupied with ongoing cases but stand ready and willing to act on information which comes to them relative to the safety of a conviction. What is needed are policies for doing so.

The Milgaard group requested information from Saskatoon Police in 1981 but were told that any release of information by them would need to be authorized by the Attorney General. The police obliged them to the extent of contacting witnesses but the latter did not want their whereabouts known. Joyce Milgaard's then lawyer, Young, was terminated by her before he could approach the Attorney General for permission.

Joyce Milgaard was aggressive in her efforts to get information, and in the process alienated witnesses and caused problems for her lawyers. Her efforts in 1981 and 1982 towards the reopening of her son's case produced no information that should have caused the authorities to take action.

Joyce Milgaard did not publicly question the conviction during the first 10 years, interesting herself instead on getting parole for her son. Because he would not accept prison life, he escaped in 1974 and again in 1980. She then despaired of parole, offered a reward, and began to reinvestigate the crime with no new evidence, but with a belief in her son's innocence.

Proceeding from that belief, she concluded that witnesses who had implicated him at trial had lied and that the police had twisted the facts to put him in prison.

She failed to capitalize on work done for her by her first two lawyers, and agents operating on her behalf. She was mistrustful of, and antagonistic towards the police, interpreting their confidence in the verdict as opposition to her efforts.

Joyce Milgaard contacted Wilson and John directly, without success. She instructed her counsel not to have the police contact them.

Joyce Milgaard and her counsel saw Tallis' file on March 11, 1981, and copied some of it. Her counsel was given access to the Crown file by Caldwell, who also granted an interview to another of her agents. One of her agents, Carlyle-Gordge, contacted Cadrain family members, learning that Fisher, a convicted rapist, lived in Cadrain's basement at the time of Miller's death. Efforts were made to contact Linda Fisher, but Larry Fisher was not a serious suspect for them and they did not persist.

Saskatchewan Justice would have co-operated with Joyce Milgaard in the 1980s had they been approached properly. They would have allowed unrestricted access to the prosecutor's file, and would have helped to get police files if even a marginal basis for it were shown. Her counsel did not approach Saskatchewan Justice for the purpose.

To the end of 1983, nothing had come to the attention of the police or Saskatchewan Justice which should have caused them to reopen the investigation into Gail Miller's death, except for Linda Fisher's 1980 statement to Saskatoon Police.

29. Preparation of First Application Under s. 690 (1986-1988)

Joyce Milgaard's reopening efforts stalled for a period, resuming in late 1985 with the engagement of the Wolch firm. Wolch turned the matter over to his articling student Asper to research, while retaining responsibility for the file.

Asper's involvement on the file featured quick conclusions that:

- the trial was flawed;
- David Milgaard was innocent; and
- there was official wrongdoing.

The latter belief persisted right up to the time of this Inquiry, when he finally adopted a more moderate stance (his "overall view" was that tunnel vision took over).

The Milgaard group resolved to carry on a media campaign in conjunction with the application, and as well promised Justice Canada that there would be a family presentation in conjunction with the official one, but it was never produced, causing delay in the processing of the main application.

The group did not contact either Tallis or Saskatchewan Justice, suspecting both.

Two grounds were submitted in support of the first application. The first was an expert report by Ferris relating to serological evidence, and the second was an affidavit by Hall, a witness present at the motel re-enactment. The Ferris report and the Hall affidavit were submitted in support of the 1988 application. The Ferris report did not take into account the nature of the defence put forward by Tallis at trial. The Hall affidavit was prepared on the basis of a telephone conversation between Asper and Hall in which Hall neglected to mention highly incriminating utterances of David Milgaard which she later reported to the Justice Canada investigator. As a result, the two grounds stated in the application were discounted by Justice Canada rather early in the evaluation process.

Concurrent with the start of the Justice Canada investigation of the first s. 690 application, the Milgaard group conducted a media campaign to publicize their cause and launched a parallel investigation. Joyce Milgaard, later assisted by Centurion Ministries, a United States based firm advocating for the wrongfully convicted, conducted interviews which were designed to produce ideas of wrongdoing in witnesses' minds, to justify recantation. The tactics used were transparent and, as they admit, were used in the belief that David Milgaard was innocent, and that the ends justified the means.

The only valuable piece of information passed along by the Milgaard group to Justice Canada, and indirectly to the Province was, I find, the Sidney Wilson tip in 1990, and that came spontaneously to Wolch. Once Fisher's identity was known to Williams and Pearson, they followed up at once.

The Milgaard application was advanced by instalment. From the start, Wolch had urged holding back information and releasing it from time to time to keep Justice Canada's interest up. For Justice Canada, however, this only caused delays. As well, it was a strategy of the Milgaard group to feed material to the media in preference to Justice Canada.

The s. 690 application of December 28, 1988, was incomplete and consideration of it was delayed for some five months.

Information produced as a result of the first s. 690 application came to Saskatchewan either from Justice Canada or through the media, but it caused them to think that the application would be rejected, not that the case merited reopening. Saskatchewan Justice officials did not believe the Wilson recantation secured by Henderson of Centurion Ministries.

30. Ferris Report

At the request of Joyce Milgaard and Wolch in 1987, Ferris agreed to examine garments of the victim from amongst the trial exhibits, for the purpose of extracting and typing DNA. He was able to extract some DNA from the panties but could not type it. He read part of the trial transcript and concluded that the forensic evidence at trial could be taken to exclude David Milgaard as the perpetrator of the murder. Ferris assumed that Milgaard was a non-secretor of blood antigens, and was unaware that Tallis had presented the forensic evidence as exculpatory on that account.

The Milgaard group interpreted his report as proving Milgaard's innocence, something Ferris said at the Inquiry was wrong. His report was submitted by the Milgaards in support of their first application on

December 28, 1988, as one of two grounds. Justice Canada investigators took professional advice on the subject of the report and discounted it.

The report received wide publicity and, of course, came to the attention of Saskatchewan Justice and the police but, under the circumstances, it was not information which should have caused them to reopen the investigation earlier.

A gloss was added to Ferris' opinion when the Milgaard group engaged another forensic pathologist, Markesteyn, to comment. He gave an opinion that the sample thought to be human semen might have been dog urine. This opinion was seized upon by the Milgaard group and widely publicized for its value in suggesting that a gross error had been made by the people who gathered and analyzed the forensic evidence. The group did this at the cost of undermining Ferris' opinion, which was only arguable on the basis that he was talking about human semen. Another pathologist, Merry, took up the dog urine speculation with the result that Justice Canada investigators, who knew that the substance was human semen and who realized that the Ferris report did not demonstrate Milgaard's innocence, became more convinced than ever that one of the two main grounds of the Milgaard application was worthless.

The second main ground, the Hall affidavit, was similarly discounted when Williams interviewed Hall. Williams was ready to conclude his report in January of 1990 when he asked Milgaard counsel if they had any more evidence to produce. The reply was that if what they had given him was insufficient they would look for more, provided they were funded to do so.

In the two years preceding the submission of the first s. 690 application, Wolch and Asper had discovered no new evidence beyond the Ferris report and the Hall affidavit, both of which were later discounted by Williams, although he did not say so. After filing the application, they became very frustrated with the process, expecting Justice Canada to be proactive in finding evidence to support their stated grounds, as well as to investigate further.

31. Communications Between David Milgaard and the Federal Minister

David Milgaard wrote directly to the federal Minister of Justice expressing his wish for a reopening of his case. He received a reply setting out the documentary requirements. Milgaard apparently did not tell Asper about the letter, and the Minister was not provided with the appropriate documentation upon filing of the application.

In addition to this difficulty, Justice Canada and the Minister's office were led to expect a family presentation, which was to be part of the overall application. It was never sent to Justice Canada, with the result that needless delays were incurred.

The evidence was that Milgaard was in a precarious mental state and needed something to occupy his time in prison, so the family presentation idea was a sort of make work project for him. His mother and counsel did not share bad news with him, with the result that he continued to believe that the Ferris report had exonerated him and he was very bitter at the lack of progress.

32. Federal Justice Review and Investigation of the First Application

The first s. 690 application was filed on December 28, 1988. Milgaard counsel had not asked Justice Canada what supporting materials were needed and the Minister's office had to ask for them in February of 1989. That year saw federal investigators working on the application as filed, once the materials had

been provided, while the Milgaard group conducted an energetic media campaign and David Milgaard busied himself with the family presentation.

The federal investigator assigned to the first Milgaard application was Williams. Although he reported to Justice Canada and not to provincial authorities officially, he necessarily had contact with Saskatoon Police, Saskatchewan Justice, and the RCMP in the course of his investigation. The information he gathered went to the federal Minister of Justice and influenced the course of the Supreme Court Reference, resulting in its opinion which was relied upon by Saskatchewan on the issue of reopening.

As 1989 wore on, relations between Milgaard counsel and Williams worsened, and the Milgaard group resolved to rely on the media.

Williams, in fact, was working in a methodical way and keeping to himself the fruits of his investigation, as policy required. He did not consider himself entitled to express his opinion to applicant's counsel because his job was to advise the Minister who made the decisions.

The test to be applied by the Minister in considering the first s. 690 application was not well understood by applicant's counsel, who thought that what was needed was evidence tending to show innocence. From Williams' evidence, one concludes that the test applied by the Minister at that time required the applicant to produce new information, or evidence that a reasonable basis existed to conclude that a miscarriage of justice had likely occurred. "Miscarriage of justice" is an expression which would include conviction in the face of innocence or probable innocence, but was not restricted to that.

Williams explained that his job was to collect information, not to argue with the applicant, so he took the applicant's statement of grounds as his only concern at the pre-screening stage. When that hurdle was passed, he became more proactive but not, I find, in looking for grounds beyond those stated in the application. He effectively answered the charge of procrastination made by the Milgaard group against Justice Canada. The application took as long as it did to process because the group advanced grounds incrementally.

Williams explained that the applicant was responsible for presenting the grounds because the Minister would be in no position to know the details. These needed to be explained by the applicant before the Minister could decide if the reasons given warranted a remedy. The applicant put up two grounds supported by a report and an affidavit, expecting a far-ranging investigation by the Minister to follow. Instead, the Minister investigated the report and the affidavit, found them both wanting, and asked for more. Fisher as murder suspect was raised, but Pearson, assigned to investigate him, could find no hard evidence linking him to the murder. The Minister refused the application.

The Milgaards persisted with Fisher for the second application which was allowed for public policy reasons. The similar fact evidence relating to Fisher's crimes was emphasized in the second application, but, I find, was not persuasive in ordering the Reference. Before the Supreme Court of Canada, that same evidence was looked at as something new which, had it been known to the defence, might have been put to the jury as a defence and could have affected their verdict. A new trial was recommended.

Williams was assigned to the second application as well, and a limited investigation followed. Additional information on Fisher rape victims was provided, but not all witnesses were interviewed because Justice Canada was considering a reference to a Court of Appeal for advice to the Minister.

There was no lack of diligence on Williams' part in investigating the grounds advanced. He had to delay completion of his report more than once because new grounds were advanced requiring the interview of additional witnesses.

Williams became the scapegoat for the dissatisfaction of the Milgaard group relating to the s. 690 applications. Lack of progress was blamed on him, whereas it stemmed from an incomplete application followed by the incremental disclosure of grounds for relief. The group resorted to the media, it is said, because the group had nowhere else to turn. I reject that contention. The media campaign was not borne out of frustration with Williams, but rather was a separate venture entered into by the Milgaard group concurrently with the filing of the application.

Williams' interview of John convinced him that her May 24, 1969, statement had not resulted from police pressure, and that she still remembered some things from that morning which confirmed the trial evidence. She told him that she had not lied in her statement, and that she would have told the truth to Mackie who took her statement, even though she could not remember some things.

There was nothing oppressive or improper in Williams' questioning of witnesses, although because he had to probe for the truth he tested them with some persistence. It is appropriate to observe, however, that Williams went about his work in strict compliance with the policy of the Minister as he then knew it, which was to respond only to grounds raised by the applicant. The whole course of his investigation leaves the impression that while he had an open mind, he also was determined not to stray from the strict lines of inquiry which he felt were dictated by the application itself.

Williams enlisted the help of Pearson of the RCMP on February 28, 1990 to investigate the Fisher matters, which had been advanced as an added ground for relief under the s. 690 application.

Pearson's work was professional, thorough and skillful, and drew praise from even members of the Milgaard group.

Pearson was looking for evidence that showed Fisher as the killer. As such he needed material that would support a criminal charge. To be admissible in court as an identifier, Fisher's rapes as similar fact evidence needed to have probative value which exceeded their prejudicial effect, and similar fact evidence is highly prejudicial. So the standard is high.

But similar fact evidence can also be used by the defence to raise a reasonable doubt that someone other than the accused was the perpetrator, and a lower standard applies.

Williams and Pearson were not looking for a defence for Milgaard of reasonable doubt through similar fact evidence, which would have met a modest standard of similarity, but rather evidence which could show that Fisher was the killer, and if that was to be done by similar fact, the similarity needed to be striking. Arguably, both Williams and the Minister of Justice, to whom he submitted the first application, applied an unnecessarily high standard. After the second application was submitted to the Supreme Court of Canada, that Court said that a new trial was justified by new evidence which, if presented to Milgaard jury's, might have affected the verdict. Why would not the same evidence have called for a remedy on the first application, which was dismissed? Similar fact evidence in both cases was the same. The answer is not clear, however the early emphasis by the applicant had been on Fisher as killer and Milgaard, consequently, being innocent. The emphasis gradually shifted to similar fact evidence which might have affected the jury in finding a reasonable doubt, but for the purposes of the first application, the Minister was not persuaded.

Williams and Pearson had to contend with unwanted publicity, repeated requests for a speedy conclusion to the investigation, and new allegations, the investigation of which delayed preparation of the report to the Minister.

Tallis was criticized for not calling a defence at trial, but after speaking to him, Williams concluded that had David Milgaard taken the stand, the Crown's case would have been strengthened.

Williams was the subject of severe criticism by the Milgaard group for his conduct of the investigation. He regarded the criticism as a strategy to bring so much pressure that the easiest way to deal with it would be to grant the application. He did not let it guide his activities.

By September 21, 1990, the s. 690 investigation was finished, and federal officials met with Milgaard counsel to hear their perspectives of the case and examine the Fisher situation.

The Williams investigation was expert, thorough and principled. The investigator assigned to help him, Pearson, was a senior, highly qualified officer. Despite his best efforts, he could not find an evidentiary link between Fisher and the Miller murder, although he suspected Fisher.

Joyce Milgaard, assisted by Henderson of Centurion Ministries had conducted a parallel investigation featuring interviews of witnesses and a publicity campaign. Joyce Milgaard was urged to co-operate with investigators instead of making her own inquiries, but she did not comply.

Pearson enjoyed full co-operation from the Saskatoon Police. Although his main focus was on finding evidence which inculpated Fisher, he did not pass over evidence which involved Milgaard.

Williams discounted the Ferris report, as well as the opinions of Drs. Markesteyn and Merry which it spawned in 1990. But at the time he did not consider that it was his position to explain to the applicant why the reports were not accepted. Once the application was ready to go to the Minister, however, he met with Wolch and Asper on October 1, 1990, and a full discussion of the issues took place.

The Milgaard group enlisted a Member of Parliament to their cause. He raised the Fisher matter in Parliament, to the detriment of Pearson's investigation. The latter was trying to get Fisher's confidence and have him submit to a polygraph. However, when Fisher became publicly known as a suspect in the Miller murder, his life in prison was in danger. Allowing somebody else to do one's time is a cardinal offence in the penitentiary. Fisher became unapproachable.

Public criticism of Justice Canada investigators by the Milgaard group drew the fury of the Minister. Joyce Milgaard said that she feared Minister Campbell would get so mad she would turn down the application.

33. Engagement of William McIntyre

Federal Minister Kim Campbell engaged retired Supreme Court Justice William McIntyre to advise her in 1990.

His advice is particularly relevant to us because Saskatchewan Justice relied upon it as justification for not reopening the investigation into the death of Gail Miller. The Milgaard group was denied access to McIntyre's report to the Minister, as being privileged. It has also been withheld from us as being constitutionally protected.

The furor caused by its non-release stemmed from the Minister justifying her opinion by reference to it. She was entitled to take legal advice and equally entitled to rely upon it. But referring to her reliance on it

without producing it to explain her reasons caused public suspicion and resentment, especially amongst the members of the Milgaard group.

Justice Canada officials, however, communicated the substance, if not the report itself, to Saskatchewan officials who relied upon it in not reopening the investigation.

34. Criticism in the Media

The media campaign conducted by the Milgaard group gained early support from journalist Lett of the Winnipeg Free Press. Asper courted a wider audience in the eastern press, and was a member of television panels highly critical of Justice Canada's handling of the application. He was joined in this effort by Joyce Milgaard who told us that she realized that they were taking a calculated risk in publicly criticizing Justice Canada and the Minister while their application was under review. There can be no doubt from the evidence of police and both federal and provincial Crown officials that they came to mistrust anything emanating from the Milgaard group.

35. Federal Minister's Decision of February 28, 1991

The first Milgaard s. 690 application was rejected by the federal Minister of Justice, Kim Campbell, who found that there was no body of new evidence or information capable of demonstrating that a miscarriage of justice had likely occurred. Saskatchewan relied upon this information, and saw no need to reopen the case.

Minister Campbell did not refer to the John statement of May 24, 1969, in her letter rejecting the first application. Although the most incriminating parts were not in evidence at trial, John had neither recanted nor repeated them. I see no reason preventing the Minister from having taken that statement into account, but if she did, it would not be in the category of information coming to the attention of police or Saskatchewan Justice which should have caused them to reopen sooner. The reverse would be true.

36. Milgaard Reaction and Media Coverage; Response by Saskatchewan Justice

The Milgaard group reacted with outrage, saying that they had done all the work, that Justice Canada had failed in its duty by not doing a full investigation, and that officials were not impartial. They added personal attacks on Minister Campbell, which diminished the credibility of their critique and reflected badly on the administration of justice.

37. Second s. 690 Application

The second s. 690 application was filed August 14, 1991, accompanied by a publicity campaign organized by the Milgaard group. It was designed to bring maximum pressure upon the Minister. McCloskey of Centurion Ministries alleged that Milgaard was framed, and that the Saskatoon Police covered up Fisher's tracks.

Discussions began in August of 1991 between federal and provincial officials as to what could be done to air the matter publicly. On November 28, 1991, the Minister ordered the matter to the Supreme Court.

On a substantive basis, Saskatchewan Justice had confidence in the federal Minister's rejection of the first application, and doubted the strength of the second. For them, the media campaign had proven to be counter-productive. Genuine complaints or suspicions were trivialized by false accusations. Provincial officials no longer believed anything Joyce Milgaard said.

Some of the Saskatoon Police files relating to Fisher's rapes in that city were missing from police records. The Milgaard group seized upon this as evidence that somebody had tampered with the system to cover up the rapes lest a connection be made between them and Gail Miller's murder. They alleged that the files had gone missing after the McCloskey accusations of cover-up on August 16, 1991. In fact, they had been missing long before, probably lost in a move of records to a new police building. A Saskatoon Police Commission investigation was undertaken, and concluded that the files had probably been lost or destroyed through inadvertence.

Joyce Milgaard confronted the federal Minister of Justice in public on May 14, 1990, while the first application was still being investigated. The Minister refused comment. Following rejection of the first application, she approached Prime Minister Brian Mulroney in public on September 6, 1991, within a month after filing of the second application. He expressed an interest in the case and promised to do what he could.

38. Federal Justice Consultation with William McIntyre

Justice Canada again consulted with McIntyre for advice in late 1991.

Saskatchewan Justice received information which they relied upon to the effect that McIntyre was of the opinion that the second s. 690 application revealed "still no reasonable basis" to conclude that a miscarriage of justice may have occurred.

39. Decision to Refer to the Supreme Court of Canada

In November 1991, the Minister decided to refer the matter to the Supreme Court, perceiving widespread concern as to whether there had been a miscarriage of justice in the conviction of David Milgaard. It was in the public interest that the matter be inquired into.

In compliance with the wishes of the Milgaard group, the hearing was set at the earliest possible time, mid-January 1992. The Supreme Court set guidelines for its consideration of the question of whether the continued conviction of David Milgaard would constitute a miscarriage of justice.

Proof of innocence, either on the criminal or civil standard, would have sufficed for a remedy, but it was not shown at the hearings. Being able to raise a reasonable doubt in 1992 would not suffice, but if there was credible new evidence, not available at trial, which could have affected the verdict, a court should look at it, and that is what led to the recommendation for a new trial.

The Supreme Court's opinion demonstrated that, in their view, a miscarriage of justice had not occurred, but would if the conviction were allowed to stand (the "continued conviction").

The Supreme Court hearings followed an adversarial model, with Saskatchewan Justice being instructed to support the conviction. The documentary case was put together by Justice Canada with the approval of both Milgaard counsel and Saskatchewan Justice. Notwithstanding the adversarial role assigned to them, Saskatchewan Justice counsel were free to take any action dictated by the evidence, and would have told federal officials at once had they seen any need for a new trial.

All parties undertook to provide full disclosure before the hearings.

At the Reference, Milgaard counsel argued that incriminating evidence against their client had been produced by "highly coercive and improper police tactics". Some evidence was heard in support of this

position, but the Supreme Court said that they had been presented with no credible evidence of police misconduct.

Police and prosecutorial misconduct was, therefore, a live issue at the Supreme Court hearings but the case for it was not made. The assertion that Milgaard counsel were not permitted to call evidence of police misconduct before the Supreme Court was refuted by Brown and Fainstein, counsel at the Reference and witnesses before the Inquiry. In fact, testimony was heard at the Reference from Roberts and Karst, and the Mackie Summary was presented, all relating to allegations of misconduct. None was proven. The opinion given by the Supreme Court represented the view of five dispassionate, learned judges with everything before them but the DNA evidence. At the conclusion of hearings, they were left with at least an equal possibility that David Milgaard was the culprit. They recommended a new trial for him, but expressed no opinion that Fisher should be charged.

The Milgaard group welcomed the Supreme Court's recommendation for a new trial, to the extent that it would afford David Milgaard a chance for a not guilty verdict. But they wanted more – a declaration of innocence which would give them a chance at compensation.

Saskatchewan Justice ordered a stay on the basis that a new trial would not be in the public interest given the lapse in time. Saskatchewan Justice correctly foresaw a "public relations war" in furtherance of a compensation claim by the Milgaard group.

Sensational accusations of official wrongdoing (the Breckenridge allegations) were widely disseminated as were baseless comments about non-disclosure, incompetence and dishonesty on the part of the Saskatchewan Crown relating to the trial. Saskatchewan officials, far from regarding such information as calling for a reopening, believed the allegations to be false and motivated solely by a desire for compensation.

40. Efforts to Conduct DNA Testing

After the Supreme Court hearings in 1992, both Saskatchewan Justice and Justice Canada remained interested in testing the victim's clothing for the purpose of extracting and typing DNA.

Semen staining was thought to be the most relevant for the purpose, and the only known remaining sample of the kind was microscopic. Technology was then available to test such a sample on an exclusionary only basis, but it would consume the entire sample and might not yield a result given the size, age and quality of the stain. A decision was therefore taken to await the further development of analytical options for testing.

Unknown to the parties, other semen staining was present on some of the victim's garments, but had been missed both by the Milgaard expert and the RCMP lab.

Had the larger stains been known in 1992, technology then available could have excluded David Milgaard as the donor of the semen on the victim's dress and, within the limits of discrimination for the type of test then available, could have identified a match with Fisher.

The larger semen stains were found only in 1997 in the Forensic Science Services Lab in the United Kingdom using a mapping technique which the RCMP lab in Ottawa was not equipped to employ in 1992.

In January of 1995, prompted by a request from David Milgaard through his counsel, Justice Canada revisited the issue of testing the small known sample and found that viable methods were now available. There followed a two year course of negotiation which culminated in the successful 1997 DNA typing in the United Kingdom. Justice Canada favoured the use of the most discriminating test available, while Milgaard counsel urged the use of a test which could exclude their client, but if it did not, would not identify him as the donor of the semen. This position derived from advocacy, not science, which dictated the use of the best and most discriminating test available. Eventually science won out and yielded the favourable result for Milgaard in 1997 in the Forensic Science Services lab in the U.K.

The successful DNA typing conducted in 1997 demonstrated that David Milgaard could not have been the donor of the semen on the victim's clothing which was tested by the laboratory, and to a very high degree of probability, it could not have been deposited by anybody except Larry Fisher.

No DNA based information came to the attention of Saskatchewan Justice or the police between 1992 and 1997 which should have caused them to reopen. The situation could have been otherwise had not semen stained material on the victim's panties been wasted in the Ferris lab and other staining missed by the RCMP analyst. These materials, if tested by the methods available in 1992, might have caused authorities to reopen the case earlier.

41. Michael Breckenridge's Allegations

Allegations of official misconduct by Breckenridge came to Wolch on March 21, 1992, when the Supreme Court hearings were still ongoing, but were not introduced into those hearings.

Some investigation was done by the Milgaard group into Breckenridge – not enough to demonstrate his whereabouts at relevant times, but sufficient to cast doubt upon his credibility. No action was taken for about six months, but then the allegations were published as proof of official wrongdoing. A protracted and costly inquiry was conducted by the RCMP, who reported to Alberta Justice. The finding was that there was no substance to the allegations. The ambit of the inquiry reached beyond the targets of the Breckenridge allegations and amounted to a virtual reinvestigation of the death of Gail Miller. No wrongdoing on the part of police or prosecution was found. No cover-up of evidence was found.

Nothing produced by the Milgaard group's campaign to show official misconduct or cover-up was convincing and it was not information which should have caused Saskatchewan Justice or police to reopen sooner than they did.

The propagation of the Breckenridge allegations and other charges of official wrongdoing by the Milgaard group were known to be incorrect by public officials, the subjects of such allegations. The result was a complete loss of credibility for the Milgaard group.

The RCMP investigation (Flicker) was lengthy, sophisticated, costly, and comprehensive. No fewer than 68 allegations of conduct amounting to obstruction of justice were leveled by Joyce Milgaard, and each one of them was investigated and dismissed.

At the conclusion of the RCMP investigation in 1993, investigators simply did not know what had happened at the murder scene. They had no evidence to doubt the results at trial, on appeal, and at the Supreme Court. John, Wilson and Milgaard could have helped, but did not. The barrage of complaints and false accusations reaching investigators served only to trivialize the applicant's cause, and tended to reinforce investigator's belief in Milgaard's guilt.

Information coming to the attention of RCMP investigators showed a pattern of evidence incriminating Milgaard rather than tending to show his innocence, and therefore was not something which would prompt the Crown to reopen the case.

Throughout the course of Flicker, investigators were suspicious of Fisher but lacked reasonable and probable grounds to charge him.

Investigators found no evidence of public pressure on the police in 1969 to solve the murder, nor did they find evidence that pressure influenced police actions.

Investigators reported "There is no new evidence which would exonerate David Milgaard, or that would implicate any other person, including Larry Fisher". That was as of August 15, 1994, three years before DNA typing in England. The first part of the investigators report was correct in that there was no new evidence which would exonerate David Milgaard, but the second part that there was no evidence which would implicate any other person including Fisher was inaccurate in its choice of the verb "implicate". Investigators had reason to suspect him, but not enough reason to charge him. David Milgaard's status remained as it was after the opinion of the Supreme Court.

The release of the Alberta Justice and RCMP Flicker reports in 1994 and 1995 gave Saskatchewan no cause to reopen the investigation.

42. Public Disclosure of RCMP Report and Reaction of Milgaard Group

Without reading the report of the RCMP, Joyce Milgaard described it as a whitewash. David Milgaard and his counsel were reportedly of the same view.

I agree with the Alberta Justice conclusion that there was no credible evidence to support any allegation that:

- Saskatoon Police or any member;
- TDR Caldwell;
- Serge Kujawa;
- any member of Saskatchewan Justice including Attorney General Romanow; or
- anyone involved in the prosecution or investigation

attempted to obstruct justice, in any way or were involved in any criminal wrongdoing. Nothing I have heard at this Inquiry calls for a different finding.

The release of the 1997 report of the Forensic Science Services Laboratory in the United Kingdom caused a sensation. It reported that semen staining was found on the panties and on the dress. The same DNA STR profile was in samples from both garments. This profile was compared to knowns from Gail Miller, Milgaard and Fisher.

The analyst concluded that the semen could not have originated from Milgaard, and that Fisher could not be excluded as the source. His report stated that "based on data from the UK Caucasian population the STR profile obtained from both the semen stains and from Larry Fisher's blood sample is estimated to occur at a frequency of approximately 1 in 400 million men".

Counsel for Caldwell and Kujawa made a public statement July 21. In it he:

- admitted Milgaard was wrongfully convicted;

- apologized for the failings of the system;
- denied wrongdoing on their part in the prosecution; and
- expressed the opinion that the trial was free of improprieties.

The DNA results caused Saskatchewan to reopen the investigation into the death of Gail Miller, and to apologize and promise compensation to David Milgaard, leaving the door open to a public inquiry.

The Saskatoon Police were reluctant to accept the results, and so the RCMP was asked to carry the investigation of Fisher.

43. Systemic Issues and Recommendations

(a) Forensic Evidence

Retention of biological samples suitable for DNA profiling should be mandatory in all cases of forensic investigation of sudden death. Quality control standards must be set and maintained for the taking and analysis of body tissue and fluid samples. Such standards are difficult to maintain when autopsies are performed in various hospital settings. I recommend that dedicated medical examiners' facilities be established in both Regina and Saskatoon where all autopsies deemed necessary in cases of sudden death would be performed by qualified forensic pathologists in the service of the Province. Samples not currently testable should be retained on the chance that scientific advances might make them useful.

(b) Inter-Force Exchange of Information

When one force is assisting another, written reports should be exchanged. I recommend the mandatory sharing of the police continuation reports between all forces assisting in a case. The reports should become part of the major case management file, and should be directed to the file manager.

Because the RCMP is frequently called upon to assist municipal police forces in the province in the investigation of major crimes, every municipal force should enter into a written agreement with the RCMP under the Saskatchewan Police Commission policy manual, describing the terms, conditions and responsibilities of inter-agency relationships.

(c) Major Investigations

Allegations of misconduct by the Saskatoon Police in the investigation of the Miller murder have not been demonstrated at this Inquiry. I find that officers did not suffer from tunnel vision, nor were they incompetent. Investigations of major crimes have grown more sophisticated over time, and as a matter of policy, guidelines are in place to seek to ensure that all municipal forces operate under a common policy framework.

Officers are better trained today than they were in 1969. There is an increased awareness amongst them of wrongful convictions.

All forces use major case management, with a team reporting to a file manager. The entire case management file is delivered to the Crown. Any lack of investigative sophistication in the Milgaard case has been overtaken by events, and no recommendation relating to the management of major cases is required.

(d) Recording of Interviews

It is easy to say in hindsight that Roberts should have left a full record and a report to Saskatoon Police about the circumstances relating to his questioning of John and Wilson, and the same applies to Mackie in recording the circumstances of his taking of the formal statement from John the next day. But, in fact, it does not require hindsight to realize that both officers should have recognized the sensitivity of the crucial evidence they were taking, and the vulnerability of the young witnesses.

Presently, statements are recorded in audio, video, or both and to the extent practicable, that should continue. Utterances outside the setting of formal statement taking will continue to be made, and, if relevant, should not be inadmissible merely for the lack of a video or audio recording. It is a matter of weight for the trial court. Nevertheless, recording of interviews is very desirable, leading to more care in their taking, providing protection to the officer involved against false claims of intimidation, and most importantly, offering some assurance of fairness at trial for the benefit of both the accused and the witnesses.

Young witnesses and young accused should be handled with great care. An extra person should be present when taking a statement from a young person, and video or audio recording is needed.

Polygraph exams are routinely taped and have been for years. No further recommendation is needed.

(e) Prosecutorial Matters

(i) Disclosure

Both the practice of disclosure, and the underlying substantive law and regulatory regime to make possible full answer and defense, have been extensively improved since 1969. Indeed, present day standards of disclosure have not been criticized by the parties.

(ii) Trial Evidence

Section 9 of the *Canada Evidence Act* was intended as a codification of the common law exception to the rule against impeachment of one's own witness. The section, as first drafted, proved to be a conundrum in the matter of proof of hostility so subsection 2 was added, allowing the use of previous inconsistent statements in writing, or reduced to writing, to be used to prove hostility.

The application of subsection 2 in the Milgaard case contributed to his conviction, and might do the same in other cases unless it can be shown that juries understand and heed the orthodox warning that they are not to use out of court statements for proof of contents unless adopted by the witness at trial.

The application of s. 9 of the *Canada Evidence Act* poses significant prejudice to an accused. Whether that prejudice is exceeded by the public interest behind its enactment is debatable. Any further study, however, would be hampered by the lack of a factual basis for deciding whether or not juries understand and accept the orthodox warning. Amendments to the *Criminal Code* should be sought to permit jurors who have met this issue in their deliberations to be questioned about it.

(f) Post-Conviction Matters

(i) Follow-up on Reports

The Saskatoon Police failed to investigate Linda Fisher's complaint of August 1980 relating to her husband Larry as the possible killer of Gail Miller.

The complaint was properly taken and recorded, but the officer to whom it was referred took no further action. It was within his discretion to act or not. That he did not act is perhaps attributable to the fact that the complainant reported to the police station around 4:00 a.m., had been drinking and was making her report some 10 years after the event, and her description of the missing knife did not match the murder weapon. The Commission was not able to discover why follow-up was not done in this case but to help to prevent a recurrence of the problem in other cases, mandatory channels of reference should be put in place.

Complaints concerning the safety of a conviction which come to the attention of the police should be referred to the office of the Director of Public Prosecutions in the Saskatchewan Department of Justice. The police agency receiving the complaint can note that it appears to be frivolous, if that is the case, but no police force should have to bear the heavy consequences of an incorrect evaluation, as this one was.

(ii) Prosecutors and the National Parole Board

In the belief that he was acting in the public interest and that his input on decided cases was sought by the National Parole Board, Caldwell supplied them with details of the Miller murder and of David Milgaard, stating his view that Milgaard should not receive parole.

These actions did not have a direct bearing on the reopening of the case but they earned him the enmity of the Milgaard group who perceived that he was biased and vindictive. This led to much public criticism of Caldwell and, by extension, of Saskatchewan Justice.

For the better administration of Justice in this province, I recommend that prosecutors desist from unsolicited contact with the Parole Board. If asked, they should confine recitation of the facts of a case to those found by the courts. They should avoid leaving the impression that they are heavily invested in a case on a personal level.

(iii) Retention of Trial Exhibits, Police Files and Notebooks

Caldwell retained the Milgaard trial exhibits with the unforeseen result that DNA typing was possible in 1997.

Although retention poses a significant storage problem, I would recommend that in all homicide cases, all trial exhibits capable of yielding forensic samples be preserved in their original form for a minimum of 10 years. Convicted persons should be given notice after 10 years of the impending destruction of exhibits relating to their trials, allowing applications for extensions.

In all indictable offence cases, documentary exhibits should be scanned and placed in permanent electronic storage, unless a court orders otherwise.

All police and prosecution files covering trials of indictable offences should be retained in their original form for a year, then scanned and entered in a database where a permanent secure electronic record can be kept. The costs of scanning would in some measure be offset by the reduced cost of storage.

Officers' notebooks, now regarded as the property of the police service, can be important in claims of wrongful conviction. Present policy requires their preservation so no recommendations are needed.

(iv) Victim Services

Some of Larry Fisher's rape victims were not informed of his guilty pleas, leading to accusations from the Milgaard group that the police wanted to conceal them.

Every victim of crime whose case goes through the court system should be informed of its disposition.

(g) Review of Criminal Convictions

(i) The Milgaard Case

The Milgaard group chose to bring an application for mercy to the federal Minister of Justice under what is now s. 696.1 of the *Criminal Code*. It was brought 19 years after conviction, advanced by installment, leading to investigative delays and was accompanied by a media campaign which hampered the work of investigators. The Minister rejected the first application with reasons which the Milgaard group found to be unsatisfactory. A major complaint by them, and others, was the Minister's stated reliance upon advice received from an outside source, without disclosing the advice.

Notwithstanding the shortcomings of the application, it met the threshold for further inquiry by Justice Canada and would have done so, as well, under the model used by the United Kingdom's Criminal Cases Review Commission (CCRC)², the difference being that under that model, the application might have succeeded. With its proactive methods, the CCRC would have found the Linda Fisher report and acted on the s. 9 *Canada Evidence Act* problem, realizing that the Court of Appeal was wrong to hold that the lack of a *voir dire* made no difference to the outcome. They might have heard from Tallis, as we did, that had he been able to cross-examine on circumstances in the absence of the jury, he might have succeeded at keeping the out of court statement from the jury. As well, investigators might have recognized that the similar act evidence of unsolved rapes might have offered a possible defence at the original trial.

(h) Compensation and Factual Innocence

Decisions relating to compensation for wrongful conviction should continue to be dealt with by the Executive, but compensation should not be limited to those cases of wrongful conviction where factual innocence has been found. It is too difficult to prove. Wrongful conviction resulting from investigative, prosecutorial or judicial misconduct should be open to claims for compensation.

(i) Section 690 Applications

To the extent that information gathered during the course of the s. 690 applications in this case reached the police and Saskatchewan Justice, those applications were both relevant and within our competence to consider. We concerned ourselves with the quality of information generated by federal investigators while refraining from any criticism as to the manner in which they conducted their affairs.

We have not inquired into the reasons for actions or advice between federal officials, although some information in that regard has found its way into the public domain.

Minister Campbell justified her decision to refuse the first application, at least in part, by reference to advice she received from outside counsel, not specifying what the advice was. This was her prerogative, but with the greatest respect, had she simply given her reasons, perhaps based more or less on advice received, without trying to justify them by reference to its author, there could be no cause for complaint.

As it was, the applicant asks how he can be assured of fair treatment when the decision maker relied upon unspecified reasons which she refused to divulge. The question has merit.

No substantial criticism of the ministerial decision is intended, only the expression of it. Reasons for a decision should stand on their own merits, and not be justified by unspecified advice. If a commission independent of government was formed for the purpose of dealing with claims of wrongful conviction, instead of Justice Canada investigating under s. 696.1, it might take advice and refuse to disclose it as a matter of privilege, but solicitor-client privilege is something that can be waived, whereas Justice Canada has successfully argued in Court that its constitutional prerogatives preclude production of such advice to provincial commissions.

Parliament has addressed some of the deficiencies in the old s. 690 proceedings:

- the test to be used by the minister is set out in s. 696.3(3);
- the application process is regularized;
- powers of investigators are added so that the speed of the process is no longer dependant upon cooperation of witnesses; and
- the considerations taken into account by the minister in applying the test are set out in s. 696.4.

The Milgaard experience has convinced Justice Canada of the need to share information with the applicant, protecting confidentiality where needed.

Even with the improvements noted, the s. 696.1 process has an inherent lack of transparency on the investigative side. There is a climate of secrecy and parochialism in Justice Canada which is ill suited to the investigation of claims of wrongful conviction which necessarily involve aspects of both provincial and federal jurisdiction.

Any findings of misconduct made by a federal minister under s. 696.1, touching upon the actions of police or prosecution, directly affect the administration of justice in the province which, therefore, has an interest in the public's perception of how the s. 696.1 process proceeds.

The s. 696.1 process will remain vulnerable to attack because it remains reactive in nature and assumes an inquisitorial role only on the basis of grounds advanced by the applicant. Most applicants are without resources which would enable them to put forward their best case.

An apprehension of bias attaches to federal investigators operating under the Ministry of Justice. Members of the public and applicants alike tend to view them as prosecutors, or at least in sympathy with the prosecution side.

There is as well resentment that one elected person, the Minister of Justice, can decide the fate of an applicant relying, perhaps, on a single advisor. The minister is subject to political pressure.

These are all valid concerns in my view, and even though some of them do not bear objective scrutiny, public perception of what is fair must be respected.

(j) The CCRC Model

In the United Kingdom (except for Scotland), claims of wrongful conviction are reviewed by an independent body, the Criminal Cases Review Commission (CCRC). The creation of such an agency has been recommended in Canada but so far has been rejected, as I understand it, on the basis that a further level of bureaucracy is not needed to replace Justice Canada acting under s. 696.1, especially one which might be seen as a further level of appeal. In support of the status quo, it is argued that legislative changes in 2002 have resulted in an increase in remedies granted by the minister in finding a reasonable basis to conclude that miscarriages of justice have likely occurred.

Under the CCRC model, an independent agency in Canada would serve as a gatekeeper to the Court of Appeal. It would make no findings itself, except determining cases where there was a real possibility that the conviction would not be upheld by an appeal court.

Quite apart from the performance of investigators under the present s. 696.1 regime, and of the response of Ministers of Justice acting upon their recommendations, the present system lacks transparency and suffers from a perception of bias. Evidence at the Inquiry describing the CCRC revealed a pro-active agency of wide profile-defence, prosecution and policing being represented, where the applicant is not required to do his own investigating, the CCRC being responsible for looking at the case as a whole. It does not concern itself with guilt or innocence, just whether there is a real possibility that the conviction is unsafe, something the Court of Appeal must decide. If they find that it is unsafe, they must quash the conviction.

The CCRC's concern is whether a person is rightly or wrongfully convicted, considered on an objective, evidential basis. Wrongful conviction can mean that someone has been convicted of an offence which he did not commit (he is innocent in the absolute sense), or it can mean that a person was convicted in a flawed trial or because significant, relevant, new evidence has come to light which might have affected the verdict of a jury.

The term miscarriage of justice is used loosely, and its meaning is not debated.

The CCRC does not reassess matters which a jury has considered.

The real possibility test has to be applied in finding new evidence or a new factor which could have caused the trier of fact to act differently.

Legislation requires that the Court of Appeal find the verdict to be unsafe as a condition of ordering a new trial. A finding that it might be unsafe does not suffice.

Applicants are encouraged to send what they have, but it is the CCRC's responsibility to get what it needs.

The CCRC's scope of inquiry is not defined by the grounds advanced. It is pro-active, but not there to substitute its opinion for that of the jury. Rather, it looks for something new and evaluates its impact.

The success rate for applications is rather low in terms of those who receive a remedy, and even a relatively high volume of cases can be handled quickly on the basis of documents.

The majority of cases receiving a remedy feature no misconduct or deliberate wrongdoing.

On balance, I think that claims of wrongful conviction presently investigated under s. 696.1 of the *Criminal Code* should be heard instead by an independent review agency established along the lines of the English CCRC.

44. Public Inquiries into Claims of Wrongful Conviction

The English experience has shown a reduction in requests for public inquiries since the establishment of the CCRC. It is greatly hoped that the experience would be repeated here, should an independent agency take over the s. 696.1 task from Justice Canada. Public inquiries will continue to be desirable, or even necessary in some situations, but they are very expensive exercises, and if significant public expenditure can be avoided by the establishment of a truly independent, transparent and effective investigative agency, it should be done.

Chapter 5

Systemic Issues

Many systemic issues were suggested by the evidence, but a good number of the problems seen in the Milgaard conviction have been remedied over time. Others have not. I will review some of the problem areas as they arose in the course of the investigation, prosecution, and reopening.

1. Forensic Evidence

In 1969, the identification officer was at an autopsy to seek the type of evidence needed. Police deferred to the pathologist, who was in charge, so the responsibility for keeping or discarding bodily substances would have been assumed by him.

The Inquiry heard expert opinion, which I accept, that quality control standards be set and maintained for the taking and analysis of body tissue and fluid samples. As well, samples not currently testable should be retained on the chance that scientific advances might make them useful. A case in point is the vaginal fluid discarded at autopsy. It might have been used for DNA profiling years later. I understand from the evidence that DNA profiling is routine in serious cases, so a caution for retention is probably unnecessary. Still, it should be made mandatory in all cases of forensic investigation of sudden death.

The Province of Saskatchewan has only recently engaged the services of forensic pathologists to do medical-legal autopsies. Quality control standards are difficult to maintain when autopsies are performed in various hospital settings. I recommend that dedicated medical examiners' facilities be established in one or more major centres where all autopsies deemed necessary in cases of sudden death would be performed by qualified forensic pathologists, in the service of the Province.

2. Inter-force Exchange of Information

As we have seen, early in the investigation of the Miller murder, RCMP officer Edwin Rasmussen recorded that three unsolved sexual assaults committed in 1968 and the Miller murder might be related. Evidence from Joseph Penkala and others convinces me that this was common knowledge between senior investigators in the Saskatoon Police and in the RCMP, but Rasmussen's report was not sent to Saskatoon Police, who were the prime investigators, leading to the allegation that they ignored it. Coordination between the forces was done informally and verbally. Written reports were not exchanged. In my view, when one force is assisting another, written reports should be exchanged to enhance coordination.

A second assisting force was Calgary's who supplied a polygrapher, Art Roberts. His reports were the property of the Calgary Police Department and he did not copy them to the Saskatoon Police, which left a significant gap in the information relating to the circumstances of his examination of John and Wilson.

I would recommend the mandatory sharing of continuation reports between all forces assisting in major cases. The reports would be directed to the file manager and would become part of the major case management file.

The Commission made inquiries as to the inter-agency exchange of police reports and there does not appear to be a direct policy. However, the Saskatchewan Police Commission Policy Manual,¹ dated April 2004, contains some relevant information.

Policy AA 10 deals with Authority and Jurisdiction.

"...police services are encouraged to assist other police services and/or obtain assistance of police officers from other jurisdictions."²

Policy OC 20 deals with Criminal Investigations.

Police services will ensure they have the capacity to investigate offences, in particular serious and/or complex offenses, or are able to access the necessary resources and assistance. Police services will ensure they have the capacity to collect, store, analyze and retrieve intelligence with respect to criminal activity.

...

Procedures for criminal investigations must include provisions:

- for partnerships and internal and external co-operation that are necessary with respect to administering and conducting criminal investigations of serious and/or complex offences;

Policy OJ 10 deals with Liaison with Other Agencies. Police services "will establish and maintain an effective and mutually beneficial liaison with other agencies". It goes on to state that:

Procedures will be developed with respect to liaison with other agencies including, but not limited to:

- liaison with:

...

1
2

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- other police services;
- ...
- written agreements describing the terms, conditions and responsibilities of inter-agency relationships.

As compared to 1969, sharing of information within police forces has improved greatly according to evidence I accept. Bulletins are commonly posted throughout the service. The data bank offers access to all information by all members.

Because the RCMP frequently assists municipal police forces in the province, there should be written agreements between them describing the terms, conditions and responsibilities of inter-agency relationships.

3. Major Investigations

The investigation of major crimes in the province is much more structured today than it was in 1969. The Executive Director of the Saskatchewan Police Commission told us that all forces now use major case management, with a team reporting to a file manager. Senior investigators follow progressively more detailed courses, examples of which concern DNA, crime scene investigation, analysis and reconstruction, patterns of offending and victimization and the role of technology. Operational plans (of which the Mackie Summary is an example) are generated by a case manager. They are very common and are intended to either substantiate or eliminate leads. In general, officers preparing to interview a witness can access the file to see what other witnesses have said. Officer's notebooks are turned in at the end and form part of the file for disclosure. The entire case management file is delivered to the Crown.

Although the leader of the Flicker investigation could not recall anything that was dropped or overlooked or any leads that were missed by the Saskatoon Police or RCMP in their investigation of the death of Gail Miller, under a major case management system, he said, one might have seen more extensive documentation going from the RCMP to the Saskatoon Police. As it was, it seemed that the RCMP reports were meant to satisfy superiors.

Senior officers of both Saskatoon Police and the RCMP agreed that members are better trained today, especially in the area of major investigations, including interviewing of subjects.

Although in 1969 senior officers of the Saskatoon Police met daily to discuss events, with briefings from a senior Detective Sergeant if required, the present day use of case management techniques in major crimes means that many of the procedures followed in the Miller murder investigation have been improved.

4. Recording of Interviews

We are told that polygraph examinations have been audio and videotaped for years, and other statements are commonly recorded in audio, video or both. To the extent practicable, that should always be so.

Both suspects and witnesses, however, will continue to make utterances outside the setting of formal statement taking. These might have relevance and should not be inadmissible merely for the lack of a video or audio recording. It is a matter of weight for the trial court. However, in view of the problems posed by the lack of recording of circumstances surrounding the Wilson and John statements of May 23 and 24, 1969, police should ensure that every statement taken from a young person in a major case, whether as witness or suspect, is both audio and video recorded.

5. Prosecutorial Matters

(a) Disclosure

Pre-trial disclosure is much wider today than was the practice in 1969 and 1970 due to *Stinchcombe*. As in 1969, disclosure is still done through the prosecutor, but it is based on the major case management file. Thus, both the practice of disclosure and its legal foundation have been extensively improved. Indeed, present day standards of disclosure have not been criticized by the parties.

(b) Trial Evidence

It was argued that consideration should be given to changing the rule against self-serving statements, so that the accused's statement could be admitted to help his case. I have reservations. If an accused testifies, his statement to police can be used to rebut suggestions of recent invention, but if he simply told the police he did not do the crime and he says the same thing in the stand under oath, the earlier statement would add nothing to the trial testimony. If the accused does not testify, on the other hand, the introduction in evidence of a statement he made to the police tending to show that he did not do the crime would only raise the question in the juror's minds of why he did not take the stand and repeat his statement under oath.

Although Milgaard counsel did not place importance on the s. 9 *Canada Evidence Act* question at the Inquiry, it is my view and that of some witnesses, that its application played a major role in the conviction of David Milgaard when jurors were allowed to hear the Nichol John statement read out to them even though its most incriminating parts were not adopted by her on the stand. A *voir dire* was not held which would have allowed defence the chance to probe, in the absence of the jury, the circumstances under which the statement was given to the police. The judge, hearing the circumstances, might have exercised his discretion to not permit cross-examination relating to the contents of the statement in the presence of the jury, who would then not have listened to incriminating evidence and possibly taken it for proof of contents.

A full treatment of this subject is found elsewhere in the Report. It has been argued that the common law has developed under *R. v. B (K.G.B.)*³ in such a way that inconsistent out of court declarations are admissible for truth of contents in any event, provided they meet the criterion of reliability. That is so, but the fact is that an inconsistent statement under s. 9(2) of the *Canada Evidence Act* could still conceivably get before the jury without having met the same criteria of reliability, so the mischief illustrated by the application of that section in the Milgaard case might happen again unless legislative changes are made.

The proper functioning of s. 9(2) of the *Canada Evidence Act* depends upon the jury understanding and complying with the orthodox warning from the judge that out of court statements are not to be taken for truth of contents, unless adopted on the stand. Because the *Criminal Code* prevents jurors from disclosing matters of deliberation, direct evidence on the point cannot presently be obtained.

I recommend that the *Criminal Code* be amended to permit academic inquiry into jury deliberations with a view to gathering evidence of the extent to which jurors accept and apply instructions on the admissibility of evidence. Depending upon what is found, amendments to s. 9 of the *Canada Evidence Act* could then follow.

In 1970, murder trials in Saskatchewan had to be tried by judge and jury. Today, Calvin Tallis might have elected trial by judge alone if he thought that the case was not one which was suitable for a jury. Judges sitting alone are generally thought to be better equipped to disabuse their minds of inadmissible evidence, no matter how relevant it seems. But an accused who elects trial by judge and jury, whatever his reasons, is entitled to the full protection of the law. Section 9, as it now stands, seeks to strike a balance between the public interest in getting the truth from a hostile witness on the one hand, and prejudice to the accused on the other. If a better balance can be struck through the work of law reform commissions and parliamentarians, then it should be done.

6. Post-conviction Matters

(a) Follow-up on Reports

The Saskatoon Police, as we have seen, failed to investigate Linda Fisher's complaint of August 1980, relating to her husband, Larry, as the possible killer of Gail Miller. We heard that, in general, the police would not undertake a reopening on their own motion, but rather at the direction of Saskatchewan Justice, as their workload was too heavy to worry about decided cases. That is not to say that nothing would be done about a complaint, but it was clear that responsibility for follow-up lay with the detective assigned, and responsibility for passing the information to the convicted person or his representatives would lie with Saskatchewan Justice.

Evidence showed that Saskatoon Police dismissed the Linda Fisher complaint too readily. The officer who took it referred it to one of the investigating officers who decided that it did not call for further action. T.D.R. Caldwell says that had the statement reached him, he would have disclosed it to Milgaard, or someone on his behalf. He himself would not have dealt with it – rather, it would have been someone more independent, like the Director of Public Prosecutions, or an official from another city.

This complaint did not receive the attention it deserved. The Milgaard case should have been reopened in 1980 at least to the extent of questioning Fisher and verifying his movements on January 31, 1969.

Murray Sawatsky said that it is difficult to think of a substitute for the discretion of a duty officer. I agree, and that is why my recommendation will be a narrow one, related only to complaints that bear on the safety of a conviction.

At present, all complaints are signed off by the supervisor who decides whether follow-up will be done. In my view, this decision should not be left to the police whose job is finished after conviction and appeals. It is both unfair and unrealistic to expect them to maintain a watching brief on old matters or to reinvestigate on their own motion.

Murray Brown, then Director of Public Prosecutions for Saskatchewan, was unequivocal in saying that the Linda Fisher complaint should have been followed up, and that nothing, in effect, had been done. I think that the Director of that office is uniquely equipped to do something, and it is my recommendation that every complaint to police calling into question the safety of a conviction should be passed to the Director of Public Prosecutions.

The police agency receiving the complaint can note that it appears to be frivolous, if that is the case, but in my view, no police force should have to bear the heavy consequences of an incorrect evaluation, as this one was.

(b) Prosecutors and the National Parole Board

We have seen how Caldwell imprudently, but meaning well, supplied the Parole Board with details of the Miller murder and David Milgaard because:

- he thought that the Board wanted input from prosecutors; and
- he thought that the public interest required it.

I have found that his actions did not have a direct bearing on the reopening of the case, but they earned him the enmity of the Milgaard group, who perceived that he was biased and vindictive. This led to much public criticism of Caldwell and, by extension, of Saskatchewan Justice.

For the better administration of Justice in this province I recommend that prosecutors desist from unsolicited contact with the Parole Board. If asked, they should confine recitation of the facts of a case to those found by the courts as expressed in the reasons of a judge sitting alone, or in a jury trial to those cited by the judge in reasons on sentencing. Prosecutors should avoid leaving the impression that they are heavily invested in a case on a personal level.

(c) Retention of Trial Exhibits, Police Files and Notebooks

The Milgaard trial exhibits were retained, thanks to Caldwell, with the unforeseen result that DNA typing was possible in 1997.

Exhibits can be bulky and, in the case of biological exhibits, deteriorate over time. Retention poses a significant storage problem and a policy is not easy to devise. It is a common practice in the courts for the Crown to seek an order for destruction of exhibits once the appeal period has passed, but as this case shows, had such a request been granted, it would have led to the destruction of the victim's clothing which yielded the semen samples. I would recommend that in all homicide cases, all trial exhibits capable of yielding forensic samples be preserved for a minimum of 10 years. Convicted persons should be given notice after 10 years of the impending destruction of exhibits relating to their trials, allowing applications for extensions.

As to documentary exhibits, electronic storage offers the possibility of accurate and indefinite retention. I recommend that in all indictable offence cases, documentary exhibits be scanned and stored electronically, unless a court orders otherwise.

It is now generally accepted that an officer's notebooks are the property of the police service. The minimum retention period is seven years. These are "books of original entry" and serve as the basis for police reports. As such, they can be important in claims of wrongful convictions, and I recommend that they be treated as police files and preserved as such.

All police and prosecution files covering trials of indictable offences should be retained in their original form for a year, then scanned and entered in a database where a permanent secure electronic record can be kept. The costs of scanning would in some measure be offset by the reduced cost of storage.

(d) Victim Services

In 1969, there were no victim support services in the Saskatoon Police but there are now. Victims were not informed of the resolution of their cases as a matter of policy, although certain officers took it upon themselves to do so. This led to accusations from the Milgaard group that Fisher's rape victims were not informed of his guilty pleas because the police wanted to conceal them.

There has been a change since 1969 in the status of victims in the criminal justice system. Once viewed as mere witnesses, they are now seen to have rights of participation in the trial process arising from their status as victims. I doubt, therefore, that one would find a jurisdiction where victims are no longer informed of the resolution of their cases, but if one exists, policies should be changed to require notification.

7. Review of Criminal Convictions

The review and recommendations relating to Canada's conviction review process are set out in Chapter 6.

8. The Role of the Court of Appeal on Appeal from Conviction and on Reference Under s. 690

It was argued as well that the Court of Appeal should have more latitude in ordering a new trial where it considers that the conviction might be unsafe, as opposed to finding that it is unsafe. In other words, less deference should be paid to findings of fact by the judge or jury at trial. As noted in the English experience, the government did not accede to the Royal Commission recommendation in this regard, and legislation required that the verdict be found to be unsafe.

As matters stand, a Court of Appeal can act on findings of fact where it perceives palpable or overriding error in the Court below. There should be continued acknowledgment of the advantage enjoyed by the trier of fact who hears testimony firsthand.

At trial, David Milgaard's failure to testify could not be used against him before the jury. But on appeal, it is not uncommon for Courts to take note of failure to testify when rejecting an appeal. At the Inquiry, this practice was criticized by some counsel.

I should think that it is not a matter of the Court of Appeal drawing an inference against the accused for failure to testify, but merely commenting on the fact that the accused did nothing to meet a *prima facie* case, when deciding whether or not to use s. 686 to say that no substantial miscarriage of justice had occurred as a result of a trial error. And one must not be misled into thinking that the same reasons which protect the right to silence at trial – the presumption of innocence and the privilege against self-incrimination – apply on appeal before a court whose function is different than that of the court of first instance.

Section 11(e) of the Charter does not apply on appeal. As noted by Finch, J.A. in *R. v. Branco*:

...the presumption of innocence in favor of the accused before and during trial is extinguished upon conviction by proof beyond reasonable doubt of the accused's guilt. The conviction indicates that the Crown has successfully rebutted the presumption of innocence. While any verdict may be overturned on appeal, a conviction nevertheless replaces the presumption of innocence with the presumption of guilt. There is no reason to regard the appellant's guilt as being held in a state of suspension during the appeal process.⁴

And Sopinka, J. regarding s. 686(1)(b)(iii) of the *Criminal Code* in *R. v. Noble*:

If the jury accepted as truthful the inculpatory evidence, the conviction was based not on the failure to testify but on the Crown's case, and the absence of an innocent explanation of the inculpatory evidence is a factor for the Court of Appeal to consider in assessing the reasonableness of this conclusion. The failure to testify was not used by the jury to find guilt beyond a reasonable doubt, but in the face of evidence which convinced the jury of guilt beyond a reasonable doubt subject only to the existence of an innocent explanation, the absence of an innocent explanation may be considered by the jury, and by an appellate court reviewing the jury's decision, in entering or upholding a conviction.⁵

Calvin Tallis conceded that an argument could be made for relieving against the practice in Courts of Appeal of taking note of the accused's failure to testify as a reason for rejecting an appeal, but noted that the Supreme Court of Canada had dealt with the matter and was unlikely to change.

9. Public Inquiries into Claims of Wrongful Conviction

Public inquiries relating to wrongful convictions will continue to be held, I am sure. They answer an undeniable need for public disclosure, but they are expensive, disruptive to people's lives, and too often protracted and litigious. The English experience has seen a lessening in numbers of public inquiries called since the establishment of the Criminal Cases Review Commission. It is my hope that the establishment of a similar agency in this country will achieve the same result.

10. Stay of Proceedings

The entry of a Crown stay under s. 579 of the *Criminal Code* was recently considered by both Commissioner Lamer⁶ and Commissioner LeSage.⁷ Commissioner LeSage described the effect of a stay as follows:

...The plain dictionary meaning of the term 'stay' is that it is a 'suspension of judicial proceeding' or a postponement of carrying out a judgment'. Former Chief Justice Lamer recently addressed the issue and concluded, 'A stay of proceedings simply puts the charge on hold.' Black's Law Dictionary gives the legal meaning of the verb stay as 'to hold [it] in abeyance' and defines the noun stay as 'a suspension of the case'.

There appears to be no room for disagreement with this common sense, and legal, understanding of the effect of a Crown stay entered pursuant to s. 579 of the *Criminal Code*. Given that the Crown can recommence the same proceedings at any point, after entering an s. 579 stay, it is not accurate to say that the stay 'terminates' or puts 'an end' to the charge(s). It merely suspends the proceedings to await some further decision by the Crown as to the status of the prosecution.⁸

Commissioner Lamer noted that the Crown is given broad discretion to determine the manner in which a prosecution may be terminated:

5 *R. v. Noble*, [1997] 1 S.C.R. 874 at para. 103.

6 The Right Honourable Antonio Lamer, "The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken" (Newfoundland and Labrador, 2006).

7 Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (Manitoba, 2007).

8 *Ibid* at 126-127.

There are a number of ways in which a prosecution may be terminated other than by proceeding to a verdict. The Crown has a discretion as to which avenue to choose and this prosecutorial discretion, ordinarily, is not reviewable by the courts. The Crown may:

- (1) Withdraw a charge at any time prior to a plea by the accused, or with the leave of the Court, after a plea has been entered;
- (2) Enter a stay of proceedings;
- (3) Proceed with the trial but elect not to call any evidence or to stop calling further evidence, and asking the judge or jury to acquit.

The control of a prosecution, and the ability to terminate it as well as the ability to select the manner of termination is an important dimension of the Crown's *quasi-judicial* responsibilities.⁹

Commissioner Lamer made recommendations on the circumstances in which a Crown stay should be entered.¹⁰ He concluded that a Crown stay should only be entered where there "is a reasonable likelihood of recommencement of the proceedings" but it has become necessary, for example, for the police to conduct further investigation that was previously unforeseen. In contrast, where "there is no probability of a conviction nor a reasonable likelihood of recommencement of the proceedings" it would be appropriate for the Crown to commence the trial but to elect to call no evidence and request an acquittal. Similarly, a withdrawal of the charge would be appropriate where the Crown Attorney decided that reasonable and probable grounds did not exist to lay the charge, there is no probability of a conviction, or, it is not in the public interest to proceed with the charge.

Commissioner LeSage considered the use of the Crown stay power in the context of conviction review proceedings (or "s. 696 cases"). Commissioner LeSage's mandate required him to investigate and report on matters surrounding the trial and conviction of James Driskell on June 14, 1991 for murder. After more than 13 years in prison, Driskell was released on bail pending a review of his conviction by the federal Minister of Justice pursuant to s. 696.2. His conviction was set aside and a new trial was ordered by the Minister. However, the Manitoba Attorney General directed a stay of proceedings. Commissioner LeSage found that in these circumstances, there was a reasonable expectation of either a retrial or a verdict of acquittal:

Judicial processes are by definition, open public processes. Executive processes are generally not open and public. The conviction entered in these s. 696 cases was entered by judicial order after an open public trial. When the executive sets aside the conviction, it does so after a necessarily confidential internal review of the case. The public knows only about the evidence that was aired publicly at the original criminal trial. **When the executive sends the matter back to the courts, after finding a "reasonable basis" for a "likely" miscarriage of justice, the s. 696 process creates a reasonable expectation that there will be some kind of public accounting for the case at a judicial hearing.**

9 Supra note 5 at 317.

10 Ibid at 322-324.

Given my previous conclusion, that a Crown stay merely suspends the proceedings, it cannot amount to a final statement as to the validity of the prosecution. Furthermore, the process for entering a Crown stay by way of writing a letter to the Clerk of the Court means that no judicial hearing need take place. There is no opportunity for the court to adjudicate on the case in any way.

I agree with the conclusions of the *Lamer Inquiry* on this point:

A stay of proceedings may leave an impression with the public that the charge is merely being "postponed" or "the authorities" in a broad sense, still believe in the validity of the charge. That impression is likely to be magnified where, as in this case, the accused had already been convicted and spent years in prison prior to his successful appeal.¹¹

Commissioner LeSage found that a need for public proceedings and judicial supervision exists in cases where an accused has been convicted at a public trial, has spent years in jail and has then gone through the confidential executive process of a successful s. 696 review. In such cases, a Crown stay should only be used in very limited circumstances. He commented as follows:

This issue is discussed in Professor Roach's Report at pp. 21 – 29. He notes that the Crown has 4 options upon receiving an s. 696 order from the Minister of Justice directing "a new trial": first, to proceed to trial; second, to offer no evidence and invite an acquittal; third, to seek a withdrawal of the charge; and fourth, to enter a stay. There are two overarching distinctions between these various options. The first three options all require a court proceeding and some judicial supervision whereas the fourth option generally does not. In addition, the first two options produce a final verdict that will protect the accused against subsequent proceedings whereas the last two options provide no protection against double jeopardy. **In other words, the Crown stay is the only option that is characterized by both a lack of judicial supervision and a lack of finality.**

In these circumstances, Professor Roach agrees with the *Lamer Inquiry* recommendations to the effect that the Crown should either offer no evidence, or withdraw the charge, where it has been determined that there is no reasonable prospect of conviction. The Crown stay should only be used "where there is a reasonable likelihood of recommencement of proceedings" and where, for example, the Crown simply needs more time to allow the police 'to conduct further investigation.'

...

I am in general agreement with Professor Roach, and with the *Lamer Inquiry* recommendations, in the particular context of s. 696 cases. Although the *Lamer Inquiry* recommendations deal with the broad use of the Crown stay power, in all contexts, for example, at an initial trial, this is beyond the scope of my terms of reference.

...

Given my conclusion that the Crown stay power is a temporary suspension of proceedings, pending a final determination by the Crown as to the validity of the prosecution, it is my view that a "stay" should only be exercised in an s. 696

case where there is some reasonable likelihood that the proceedings will be recommended. Assuming there is an ongoing investigation, then once it concludes the case should be brought back to court for final determination, either by way of trial, the offering of no evidence or the withdrawal of charges. Although the latter option is like the stay in that it does not provide any protection against double jeopardy, it is preferable to the stay because it is requested in open court, it is subject to some judicial supervision and it sends a clear message to the public that the Crown is not prosecuting the case, as opposed to temporarily putting the case "on hold" by entering a stay. The word "withdrawal" is on its face more telling than a 'stay'.¹²

Commissioner LeSage concluded in his report that "the entry of a Crown stay does leave residual stigma and is not a satisfactory final remedy in s. 696 cases."¹³ For these reasons, only in circumstances where there is some reasonable likelihood of recommencing proceedings against the accused, should the Crown exercise its discretion to stay the proceedings.

The Ontario Court of Appeal also recently commented on the stigma that can come with a Crown stay in the case of *R v. Truscott*.¹⁴ Truscott had applied to the federal Minister for review of his conviction and his case was referred by the federal Minister to the Ontario Court of Appeal. The Crown acknowledged that if the Court ordered a new trial, a new trial would not be possible because of the lengthy passage of time. However, the Crown maintained that the inability to hold a new trial was irrelevant to the manner in which the Court should exercise its remedial powers. In other words, if there was an evidentiary basis upon which Truscott could be convicted, a new trial should be ordered. Legal counsel for Truscott argued for an acquittal and a declaration of innocence. The Court of Appeal observed:

This is one of those cases where a new trial could result in an acquittal or a conviction. In most cases, that conclusion would lead to an order for a new trial. However, to order a new trial in these circumstances merely because the remaining evidence clears a relatively low evidentiary threshold, knowing full well that a new trial will never be held, would be unfair to the appellant and does a disservice to the public. Nor would an order for a new trial accompanied by a further order staying the new trial be an adequate remedy. It would remove the stigma of the appellant's conviction, but leave in the place the stigma that would accompany being the subject of an unresolved allegation of a crime as serious as this one.

...

The integrity of the criminal justice system would also be served by bringing finality to this long-running case. The public uncertainty as to the validity of the appellant's conviction, reflected in the Minister's decision to order the Reference, deserves, if possible, a more definitive answer than an order for a new trial knowing that a new trial will never be held.¹⁵

In the unique circumstances of the case, the Ontario Court of Appeal approached the determination of the appropriate remedy by envisioning how a hypothetical new trial would proceed in light of the information before it. The Court was of the view that Truscott should be entitled to an acquittal if it was more probable

12 Ibid at 130-131.

13 Ibid at 129.

14 2007 ONCA 575, 225 C.C.C. (3d) 321..

15 Ibid at 392-393.

than not that he would be acquitted at a hypothetical new trial, and that was the case. In the result, his appeal was allowed, his conviction set aside and an acquittal was entered.

Was the use of the Crown stay in David Milgaard's case appropriate? It left him with significant stigma which was only lifted five years later with the DNA results and Fisher's subsequent conviction. But for them, it might still exist. Without a new trial, he was left without the chance of a not guilty verdict, and there was a strong argument to be made that he was entitled to at least that much. It would not have amounted to an official declaration of innocence, but no accused person has a right to expect that from a court.

It was clear from Murray Brown's testimony that consideration was given to the possibility of holding a new trial. In an April 14, 1992 memorandum that he prepared for the Deputy Attorney General he wrote:

It should be noted here in answer to any suggestion that Milgaard needs a new trial to establish his innocence, that he has now had three opportunities to establish his innocence: once at trial, once in the Court of Appeal and now in an extraordinary proceeding before the Supreme Court. On each occasion he has failed to do so...¹⁶

Brown testified at the Inquiry:

- Q. What about the notion of simply having a new trial, and not presenting evidence, and having him acquitted that way?
- A. And we would do that why?
- Q. Well, no I'm asking you. I mean I think that was, in other words, to give Mr. Milgaard the opportunity of being found not guilty?
- A. He had that opportunity and he couldn't prove he was innocent, he couldn't make a case for the Supreme Court to suggest that they even thought he was wrongly convicted.¹⁷

Brown did acknowledge that an acquittal may have given David Milgaard "some comfort" but he did not think that it would have changed the public's view of the situation. As to the Supreme Court of Canada's opinion:

...It didn't say that it found he was wrongly convicted, it didn't say that it thought he was innocent, and the suggestion to us that we stay the proceedings pretty much blocks his avenue towards sort of any kind of exoneration, even the kind that might have arisen from a not-guilty verdict.¹⁸

I am in agreement with the recommendations of Commissioner LeSage regarding the very limited use that should be made of the Crown stay in the context of s. 696.1 conviction review cases. However, I have concluded that the decision of the Attorney General of Saskatchewan to enter a stay was, in 1992, a reasonable one. In its April 14, 1992 decision, the Supreme Court of Canada stated that it would be open to the Attorney General of Saskatchewan to enter a stay of proceedings if that course were deemed appropriate in all of the circumstances. If a stay was not entered, but a new trial proceeded and a verdict

16 T37976-T37977.

17 T37990.

18 T37982.

Chapter 5 Systemic Issues

of guilty was returned, then the Court recommended that the Minister of Justice consider granting a conditional pardon to David Milgaard with respect to any sentence imposed. Brown told the Inquiry that he considered the Court's decision to be a "very broad hint to the Attorney General of Saskatchewan that he should have stayed the prosecution."¹⁹

Chapter 6

Canada's Conviction Review Process

1. Introduction

David Milgaard was investigated by the Saskatoon Police and the RCMP for the murder of Gail Miller. He was prosecuted by a representative of the Attorney General of Saskatchewan, and convicted on January 31, 1970. His appeals were exhausted in 1971.

The Attorney General of Saskatchewan could not set aside Milgaard's conviction after his appeals were exhausted. The only way for Milgaard to challenge his 1970 murder conviction was to apply to the federal Minister of Justice pursuant to s. 690 of the *Criminal Code* and seek the mercy of the Minister. The federal Minister had the power to return Milgaard's case to the judicial system.

Milgaard applied in 1988 and again in 1991. Ultimately, in 1992, after two s. 690 applications to the federal Minister, a reference to the Supreme Court of Canada and 23 years in prison, his murder conviction was set aside and he was released from prison. The Attorney General of Saskatchewan did not proceed with a new trial against Milgaard, choosing instead to follow the advice of the Supreme Court of Canada and enter a stay of proceedings.

On July 18, 1997, DNA testing identified Larry Fisher as the donor of semen found on Gail Miller's clothing. Both the Saskatchewan Minister of Justice and the federal Minister of Justice apologized to Milgaard for his wrongful conviction. Saskatchewan Justice and the police reopened the Gail Miller murder investigation. Larry Fisher was arrested and charged with the murder of Gail Miller on July 25, 1997 and convicted on November 22, 1999. In 1999, Milgaard was compensated for his wrongful conviction. On February 18, 2004, the Government of Saskatchewan ordered an inquiry into Milgaard's wrongful conviction.

Milgaard's s. 690 proceedings are relevant to the Commission's Terms of Reference. The Commission has been asked to determine not only why Milgaard was wrongfully convicted, but why it took so long for his wrongful conviction to be detected and for the murder investigation to be reopened. The Commission has also been asked to make recommendations relating to the administration of criminal justice in the province of Saskatchewan.

In order for the Commission to perform its work and fulfill its mandate, it was necessary to obtain a complete factual record. A significant part of the record in Milgaard's case relates to the two applications for mercy filed with the federal Minister. The s. 690 proceedings figured prominently in decisions made by the police and Saskatchewan Justice on whether, and when, to reopen the murder investigation. The federal Minister's handling of the s. 690 applications, and the subsequent decisions of the Attorney General of Saskatchewan and the police on reopening the investigation into Gail Miller's death were inextricably linked.

Furthermore, having investigated and prosecuted Milgaard, Saskatchewan Justice has a valid interest in the detection and remedying of his wrongful conviction as a matter relating to the administration of criminal justice. His wrongful conviction cast a shadow over the administration of criminal justice in the province for many years. Recommendations relating to the administration of criminal justice in the province can only be made in the context of a full factual record.

Following Milgaard's case, the federal Minister of Justice acknowledged the need to reform the conviction review process in Canada. In 1998, the federal Minister published a Consultation Paper entitled "Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code".¹ Input was sought from interested parties, and different options for reform were considered. The Consultation Paper noted that critics of the s. 690 process suggested it should be replaced with an independent review mechanism, but the federal Minister chose amending the existing process instead.

In 2002, the *Criminal Code* was amended and s. 690 was replaced with ss. 696.1 to 696.6.² The amendments did not fundamentally alter the conviction review process. Today, an individual seeking a review of his or her conviction, having exhausted all avenues of appeal, can make an application to the federal Minister for review on the grounds of miscarriage of justice. The discretion to either reject the application or grant a remedy still lies with the federal Minister.

The Commission has always been mindful that its reach is constitutionally limited to matters within the jurisdiction of the provincial legislature. Only the federal Minister has the power to grant remedies under the provisions of the *Criminal Code* dealing with conviction review. However, this does not supplant the province's valid interest in the detection and remedying of wrongful convictions in which it may have played a role. In *Mackeigan v. Hickman*, a case arising out of the Royal Commission on the Donald Marshall prosecution, the Supreme Court of Canada confirmed that a provincially appointed commission can validly inquire into the conviction review process as a matter pertaining to the administration of criminal justice in the province.³ The province's ability to inquire is not, however, unfettered, but subject to the limitations expressed in *A.G. of Que. and Keable v. A.G. of Can. et al ("Keable")*.⁴

1 "Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code, a Consultation Paper" (1998) published by authority of the Minister of Justice and Attorney General of Canada. See <http://www.canada.justice.gc.ca>.

2 *Criminal Law Amendment Act, 2001*, S.C. 2003, Ch. 13. See also Appendix S to this Report.

3 [1989] 2 S.C.R. 796.

4 [1979] 1 S.C.R. 218.

The constitutional limitations on the Commission's ability to inquire into Milgaard's s. 690 proceedings, as set out in *Keable*, were defined in the course of the Commission's proceedings. In anticipation of hearing testimony from federal Justice witnesses, the Commission was asked by the federal Minister to set limits on the questioning of its witnesses regarding Milgaard's s. 690 applications. I issued a ruling which became the subject of a judicial review application brought by the federal Minister before Chief Justice Laing of the Saskatchewan Court of Queen's Bench. He held that the Supreme Court of Canada decision in *Keable* precluded the Commission from asking federal Justice lawyers questions seeking to probe reasons behind actions, including questions about advice given or received in connection with Milgaard's s. 690 applications.⁵

Following Laing C.J.'s decision, the Commission heard extensive evidence from two federal Justice lawyers about the investigation and consideration of Milgaard's s. 690 applications. Legal counsel for the federal Minister was present throughout the hearings and the Commission's record shows that the constitutional limitation identified by Laing C.J. was respected.

As I will outline in this chapter, the Commission has the statutory and constitutional authority to inquire into certain aspects of Canada's conviction review process, and to make recommendations relating to the administration of criminal justice in Saskatchewan.

2. Jurisdiction of the Commission

(a) Statutory Jurisdiction

The Commission is a provincial commission of inquiry constituted pursuant to the *Public Inquiries Act* and derives its statutory jurisdiction from the Terms of Reference.⁶ The Terms of Reference, set by the Government of Saskatchewan, define and guide the work of the Commission. They read, in part, as follows:

The Commission of Inquiry appointed pursuant to this Order will have the responsibility to inquire into and report on any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Edgar Milgaard on the charge that he murdered Gail Miller. The Commission of Inquiry will also have the responsibility to seek to determine whether the investigation should have been re-opened based on information subsequently received by the police and the Department of Justice. The Commission shall report its findings and make such recommendations as it considers advisable relating to the administration of criminal justice in the province of Saskatchewan.⁷

It is the role of the Commission to interpret the Terms of Reference. They are important because they set out the Commission's specific duties and responsibilities, while setting the legal boundaries and scope of the Commission's inquiry. It is my role to determine the relevance of evidence and issues to the Commission's mandate.

The answers to what might have gone wrong in the investigation and subsequent prosecution of Milgaard resulting in his wrongful conviction and incarceration for 23 years could only be found in the context of a

5 *Canada (Attorney General) v. Saskatchewan (Milgaard Inquiry Commission)* 2006 SKQB 385, 287 Sask. R. 212.

6 *Public Inquiries Act*, R.S.S. 1978, C.P-38.

7 See <http://www.milgaardinquiry.ca/pdf/orderincouncil.pdf>.

full and complete factual record. Milgaard's efforts to have his murder conviction overturned comprised an important part of that record.

It has long been recognized that the primary purpose of a public inquiry is to investigate, educate and inform the public, and provide advice to government. Justice Cory in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)* ("Krever") described commissions of inquiry and their purpose:

Commissions of inquiry have a long history in Canada, and have become a significant and useful part of our tradition. They have frequently played a key role in the investigation of tragedies and made a great many helpful recommendations aimed at rectifying dangerous situations.

...

Undoubtedly, the ability of an inquiry to investigate, educate and inform Canadians benefits our society. A public inquiry before an impartial and independent commissioner which investigates the cause of tragedy and makes recommendations for change can help to prevent a recurrence of such tragedies in the future, and to restore public confidence in the industry or process being reviewed.⁸

In *Phillips v. Nova Scotia (Commission of Inquiry Into the Westray Mine Tragedy ("Westray"))*, Justice Cory discussed the fact-finding function of public inquiries:

One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or skepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long-term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.⁹

The importance of a full factual record in the investigation of wrongful convictions was noted by former Justice Marshall in his paper entitled "The Bounds of Redress and the Need of Full and Credible Inquiries in Wrongful Convictions" delivered to the AIDWYC conference in 2005.¹⁰ On the issue of the necessary scope of inquiries into wrongful convictions, Marshall stated the following:

8 [1997] 3 S.C.R. at 440 at para 29-30.

9 [1995] 2 S.C.R. 97 at para 62.

10 William W. Marshall, "The Bounds of Redress and the Need of Full and Credible Inquiries in Wrongful Convictions" (delivered at the AIDWYC Conference, 2005).

It is extremely difficult to comprehend how an inquiry into how a wrongful conviction occurred can be held in the absence of examination of the conduct of every stage of the process.

This would engage the conduct of the investigation that led to prosecution of the wrongly convicted and the entire judicial process that led to the faulty verdict and all affirmations of it. It would entail scrutiny of the manner in which police, prosecutors, defence counsel and judges acquitted their responsibilities.

...

This paper argues that redress for the wrongly convicted should extend beyond the confines of factual innocence to at least instances where the miscarriage of justice has been materially influenced by egregious error or conduct by officers or agents of the state. The inquiries must extend to every stage of the entire process in which the wrongly convicted individual was involved.

The stakes of wrongful convictions are too high for the wrongly convicted, their families and society as a whole to countenance any less.¹¹

An understanding of Milgaard's s. 690 proceedings is essential to the Commission's ability to make findings and recommendations in fulfillment of its mandate. Information was gathered in the course of the s. 690 proceedings that is helpful to the Commission in evaluating the propriety of the original police investigation and prosecution of David Milgaard. As well, information gathered through the s. 690 proceedings is important in assessing whether the Miller murder investigation should have been reopened by police or Saskatchewan Justice prior to July 1997.

The decision to reopen the investigation into the death of Gail Miller and proceed with any prosecution of another individual for that crime was the constitutional responsibility of Saskatchewan Justice. However, as long as Milgaard's conviction remained in place, the Attorney General of Saskatchewan would not initiate proceedings against another individual for that same crime.

The remedy for Milgaard's wrongful conviction rested in the hands of the federal Minister. Pursuant to s. 690, the federal Minister could order a new trial or hearing by the Saskatchewan Court of Appeal. After rejecting the first application, the Minister chose, on the second application, to refer the matter to the Supreme Court for its consideration and advice pursuant to s. 53 of the *Supreme Court Act*.¹² Saskatchewan Justice was an active participant in the Supreme Court Reference Case.

The federal Minister's review of Milgaard's conviction under s. 690, and the decision of the Supreme Court, affected the Attorney General of Saskatchewan. Once Milgaard's conviction was set aside by the federal Minister, decisions on the conduct of further proceedings fell to the Attorney General of Saskatchewan, as part of its responsibility over matters pertaining to the administration of criminal justice. In his testimony before the Commission, Brown said that the investigation of Milgaard's s. 690 applications by the federal Minister, the federal Minister's responses to those applications and the decision of the Supreme Court of Canada were relied upon by Saskatchewan Justice in deciding not to proceed

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Ibid at 3, 6.

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Supreme Court Act, R.S.C. 1985, c.S-26

with a new trial of Milgaard, or reopen the murder investigation before DNA test results were received in 1997.

(b) Constitutional Jurisdiction

The *Constitution Act, 1867* sets out the distribution of legislative powers between the Parliament of Canada and the Provincial Legislatures.¹³ Pursuant to s. 91(27), the Parliament of Canada enjoys exclusive legislative authority over the subject of the criminal law, including procedure in criminal matters. Pursuant to s. 92(14), each provincial legislature is granted exclusive legislative jurisdiction over "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."¹⁴

As a provincial commission of inquiry, the Commission's reach is constitutionally limited to matters within the jurisdiction of the provincial legislature. The administration of justice falls within provincial jurisdiction. In *Di Iorio v. Warden of the Montreal Jail* the Supreme Court of Canada held that the words "administration of justice in the province" are to be given a fair, large and liberal construction such that they encompass the administration of criminal justice:

Both the federal and provincial governments have accepted for over a century the status of the provincial governments to administer criminal justice within their respective boundaries. The provincial mandate in that field has consistently been recognized as part and parcel of the responsibility of a provincial government for public order within the province.

Under head 92(14) of our Constitution, as I understand it, law enforcement is primarily the responsibility of the Province and in all provinces the Attorney General is the chief law enforcement officer of the Crown. He has broad responsibilities for most aspects of the Administration of Justice. Among these within the field of criminal justice, are the court system, the police, criminal investigation and prosecutions, and corrections. The provincial police are answerable only to the Attorney General as are the provincial Crown Attorneys who conduct the great majority of criminal prosecutions in Canada.¹⁵

Notwithstanding the division of legislative powers, it was acknowledged in *Di Iorio* by the Supreme Court that implicit in the grant to the provinces of exclusive legislative authority in respect of administration of justice and in the grant to the federal government of exclusive legislative authority in respect of criminal law and procedure, is an acceptance of a certain degree of overlapping.

The constitutional ability of this Commission to inquire into Milgaard's s. 690 proceedings was settled by McLachlin J. in *MacKeigan v. Hickman*. The very issue considered by the Supreme Court of Canada in *MacKeigan* was whether a provincially appointed commission, namely the Royal Commission on the Donald Marshall Jr. Prosecution, could inquire into a reference by the federal Minister of Justice under (then) s. 617(b) of the *Criminal Code*. After 11 years in prison, Marshall was released following a successful resolution of a reference made by the federal Minister of Justice to the Supreme Court of Nova Scotia, Appeal Division. The failure of the justice system in Marshall's case led the Attorney General of Nova Scotia to establish a provincial commission of inquiry into his case. It was argued that the inquiry was invalid because it trespassed on the exclusive federal power with respect to the criminal law.

13 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.

14 *Ibid.*

15 [1978] 1 S.C.R. 152 at 206.

McLachlin J. considered the question of "whether the inquiry is 'into the administration of justice', in which case it falls within the Province's powers under s. 92(14), or into the 'criminal law' or 'criminal procedure', in which case it infringes the federal criminal law power":

The answer to this question depends on how the phrase "administration of justice" is construed in relation to the federal power over criminal law and procedure. In *Di Iorio v. Warden of Montreal Jail*, [1978] 1 S.C.R. 152, this court held that "administration of justice" should be interpreted broadly as including criminal justice. ...

...

Di Iorio v. Warden of Montreal Jail establishes, at page 205, that the police, criminal investigations, prosecutions, corrections and the court system, all comprise part of the "administration of justice". These are all matters under investigation by the Commission. The term "criminal procedure", reserved exclusively to the federal government, should not be confused with the larger concept of "criminal justice"...

...

I am satisfied that the Province has constitutional jurisdiction to inquire into the investigation, charging, prosecution, conviction and subsequent release of Donald Marshall, Jr. These are matters pertaining to the administration of justice within the Province, and, subject to the caveat expressed by Pigeon J. in *Attorney General (Que.) and Keable v. Attorney General (Can.)*, [1979] 1 S.C.R. 218, that no provincially constituted commission of inquiry can inquire into the actual management or operation of the federal activity or entity in question (there the R.C.M.P.), they do not constitute an attempt to interfere with the valid federal interest in the enactment of and provision for a uniform system of procedures and rules governing criminal justice in the country: *Di Iorio v. Warden of Montreal Jail*, supra; *O'Hara v. British Columbia*, [1987] 2 S.C.R. 591, at p. 610.¹⁶

The decision of the Supreme Court of Canada in *MacKeigan* establishes that Saskatchewan has constitutional jurisdiction to inquire into the investigation, charging, prosecution, conviction and subsequent release of David Milgaard, as matters pertaining to the administration of justice within the province, subject to the caveat expressed in *Keable*. Just as the Marshall Commission could inquire into a reference of Marshall's case to the Court of Appeal by the federal Minister under s. 617(b), this Commission can inquire into Milgaard's s. 690 applications and the reference of his case by the federal Minister to the Supreme Court of Canada.

The Marshall Commission inquired into the facts surrounding the federal Minister's reference of Marshall's case to the Court of Appeal under s. 617(b) of the *Criminal Code*. Douglas Rutherford of the federal Department of Justice testified before the Marshall Commission about his involvement in the Marshall case.¹⁷ At the relevant time he was Assistant Deputy Attorney General for criminal law in the federal Department of Justice. Prior to hearing from Rutherford, commission counsel noted for the record that his giving evidence was not to be taken as a waiver by the federal Justice Department of its right at a subsequent date to question the jurisdiction of the commission in particular areas. Rutherford did give fairly extensive evidence. In particular, he freely discussed the process involved in the federal Department

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Supra note 3 at 834-835.

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Report of the Royal Commission on the Donald Marshall, Jr., Prosecution (Nova Scotia, 1989) Volume 1 at 113. Rutherford testified before the Marshall Commission on March 8, 1988 and his testimony is found in Volume 53 of the Commission's transcripts.

of Justice's determination to refer the Marshall matter to the Court of Appeal under s. 617(b), instead of s. 617(c) of the *Criminal Code*. He discussed with candor his advice to and discussions with the then Minister of Justice, Jean Chrétien. He discussed the steps that were taken in the case, the department's handling of it, and also answered general questions about the application process.

As noted in *MacKeigan*, the Commission's ability to inquire into Milgaard's s. 690 proceedings is limited by the caveat expressed in *Keable* that no provincially constituted commission of inquiry can inquire into the administration and management of a federal institution. In *Keable*, the Province of Quebec established a commission of inquiry to investigate and report on various allegedly illegal or reprehensible incidents or acts in which various police forces were involved, including the RCMP. The terms of reference set by the provincial order-in-council were very broad. In an attempt to fulfill his mandate, Commissioner Keable issued comprehensive subpoenas directed to the Solicitor General of Canada demanding that he produce a substantial number of documents pertaining to the internal administration of the RCMP. The constitutional validity of the provincial inquiry was challenged. In ruling on the validity of the commission's mandate, Pigeon, J. said:

I thus must hold that an inquiry into criminal acts allegedly committed by members of the R.C.M.P. was validly ordered, but that consideration must be given to the extent to which such inquiry may be carried into the administration of this police force. It is operating under the authority of a federal statute, the *Royal Canadian Mounted Police Act*, (R.S.C. 1970, c.R-9). It is a branch of the Department of the Solicitor General, (*Department of the Solicitor General Act*, R.S.C. 1970, c.S-12, s.4). Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the force enjoy no immunity from the criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the force. The doctrine of colourability is just as applicable in adjudicating on the validity of a commission's term of reference or decisions as in deciding on the constitutional validity of legislation....¹⁸

In the result, the Supreme Court deemed inapplicable to the RCMP certain portions of the inquiry's terms of reference. Insofar as the provincial commission's mandate entitled it to look at the conduct of individual members of the RCMP and the methods they used in the specific instances described in the terms of reference, the Commissioner's powers were acknowledged. However, to the extent that the terms of reference authorized a systemic inquiry into the RCMP's policies and regulations for the purpose of making recommendations, they were invalid and inapplicable to the RCMP.

The thrust of the decision in *Keable* is that a provincial commission of inquiry can inquire into what a federal entity did in particular circumstances, but it cannot embark upon a direct and concerted investigation into how that entity conducts its business generally. In other words, a systemic investigation into the internal workings of a federal entity is constitutionally prohibited.

It is accepted that a provincial inquiry may touch upon matters within federal jurisdiction provided it does so only incidentally. The Supreme Court of Canada reinforced this principal in *Starr v. Houlden*, when it stated that:

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Supra note 4 at 243.

... At the outset, it is worth noting that this Court has consistently upheld the constitutionality of provincial commissions of inquiry and has sanctioned the granting of fairly broad powers of investigation which may incidentally have an impact upon the federal criminal law and criminal procedure powers.¹⁹

In *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, the Supreme Court of Canada confirmed the general constitutional rule that permits provincial inquiries that are in "pith and substance" directed to provincial matters to proceed despite possible incidental effects on the criminal law power.²⁰ In other words, an inquiry established pursuant to provincial legislation is constitutional provided that its primary purpose is to inquire into matters within the constitutional jurisdiction of the province.

It is permissible for a provincial commission of inquiry to comment on federal law. In *Diorio*, Dickson, J. of the Supreme Court stated that a provincial commission of inquiry, inquiring into any subject, might submit a report in which it appeared that changes in federal laws would be desirable.²¹ The meaning of this statement was discussed by Pigeon, J. in *Keable*:

The intended meaning of the sentence quoted is not that a provincial commission may validly inquire into any subject, but that any inquiry into a matter within provincial competence may reveal the desirability of changes in federal laws. The Commission might therefore, whatever may be the subject into which it is validly inquiring, submit a report in which it appeared that changes in federal laws would be desirable. This does not mean that the gathering of information for the purpose of making such a report may be a proper subject of inquiry by a provincial commission.²²

The primary purpose of this Commission was to inquire into the circumstances relating to Milgaard's wrongful conviction in the hope that future tragedies could be prevented. As noted by the Government of Saskatchewan, Milgaard's wrongful conviction cast a shadow over the administration of criminal justice in the province. Comment on the desirability of changes to the *Criminal Code* arising from these circumstances is merely incidental to our main purpose.

(c) Commission Proceedings and Judicial Review Application

Before public hearings commenced, the Commission prepared a Position Paper on the scope and meaning of its Terms of Reference. It was sent to all parties with standing on June 1, 2004 for review and comment. The purpose of the Position Paper was to set out the Commission's preliminary interpretation of its Terms of Reference and the scope of its statutory and constitutional jurisdiction.

The relevance of Milgaard's s. 690 proceedings to the Terms of Reference was considered by the Commission in the Position Paper. Milgaard's applications to the federal Minister under s. 690 of the *Criminal Code*, the investigation of those applications by federal Justice officials, the reporting by those officials to the federal Minister, the federal Minister's decisions in response to the applications and the Supreme Court of Canada Reference Case are all part of the "s. 690 proceedings".

As noted in the Position Paper, the Commission determined that it had statutory jurisdiction (authorized by its Terms of Reference) to inquire into the s. 690 proceedings. The Commission also determined that

19 [1990] 1 S.C.R. 1366 at 1390-1391.

20 [1998] 3 S.C.R. 3.

21 Supra note 15 at 209.

22 Supra note 4 at 243.

it had constitutional jurisdiction to inquire into the s. 690 proceedings, subject to the limitation prohibiting inquiry into the administration and management of a federal institution (here the federal Department of Justice) identified by the Supreme Court in *Keable*.

Although the federal Minister was not a party with standing when the Position Paper was initially distributed, counsel with the federal Department of Justice requested and was allowed an opportunity to provide a response to the Commission's Position Paper. The response was provided by Kerry Scullion, counsel with the Criminal Conviction Review Group of the federal Department of Justice. In his June 23, 2004 letter to the Commission, counsel for the federal Minister took no issue with the Commission's statutory jurisdiction to inquire into Milgaard's s. 690 proceedings. He also acknowledged that the Commission had constitutional jurisdiction to inquire into Milgaard's s. 690 proceedings subject to some limitations:

We are in complete agreement that a provincially appointed commission can inquire into some aspects of Mr. Milgaard's application to the Minister pursuant to s. 690 (now s. 696.1 and formerly s. 617) of the *Criminal Code*. We are also in agreement that there are constitutional limitations on any such inquiry, and as you have stated, at this stage it is difficult to ascertain the scope of these limitations without more information as to what area you as Commission Counsel or any other interested party may wish to pursue.

The Position Paper was amended following receipt of submissions from parties with standing. The parties acknowledged that the Commission had authority to inquire into the s. 690 proceedings subject to any constitutional limitations that might apply. There was also consensus with all parties that a ruling on the precise constitutional limitations would be made at a later date of the Inquiry after evidence had been heard.

Public hearings commenced in January 2005, and the Commission's Position Paper was used as a guideline for determining witnesses and the scope of their evidence. On March 4, 2005, the Attorney General of Canada, on behalf of the federal Minister, applied for standing on the basis that the federal Minister was directly and substantially affected by the Inquiry. Standing was granted on March 7, 2005.²³

The federal Minister actively participated in the Commission's proceedings. The Commission heard considerable evidence from a number of witnesses regarding Milgaard's two s. 690 applications to the federal Minister, the investigation of those applications by the federal Justice department, the Minister's decisions and the Supreme Court Reference. In November, 2005, the Commission heard extensive evidence over a span of eight days from Rick Pearson, a retired RCMP officer. Pearson assisted the federal Justice department in its investigation of Milgaard's s. 690 applications. The RCMP was a party with standing before the Commission and raised no objections to the constitutional jurisdiction of the Commission.

In advance of testimony from federal Justice witnesses involved in Milgaard's s. 690 proceedings, the federal Minister raised concerns about the questioning of its witnesses in areas that were beyond the constitutional scope of a provincial commission of inquiry. The federal Minister suggested that a ruling on the constitutional limits of the Commission should be obtained in advance of the scheduled testimony of its witnesses.

On May 18, 2006, Commission counsel circulated a memorandum to counsel for all parties with standing outlining the procedure for determination of the constitutional limits. Attached to the memorandum was an outline of areas to be covered in examination of federal Justice witnesses. The outline was drafted to include any potential subject areas of examination of federal Justice witnesses in order to assist counsel for the federal Minister in identifying those areas which the federal Minister believed were outside the constitutional scope of a provincial commission of inquiry.

On May 23, 2006, the Commission received a written submission from the federal Minister.²⁴ The federal Minister stated that it did not object to federal Justice witnesses testifying, subject to appropriate constitutional boundaries. It was submitted that those boundaries, set by the Supreme Court in *Keable*, prevented the Commission from inquiring into communications which were appropriately characterized as advice. While noting that the legislation governing conviction review had changed, the federal Minister acknowledged that "the s. 690 process as it existed at the time of Mr. Milgaard's applications" was relevant to the Commission's mandate. The federal Minister stated the following:

Commission counsel has used the terms "gather", "assess" and "analyze" a number of times to describe the Federal Government's role in dealing with Mr. Milgaard's s. 690 applications. The Minister respectfully submits that the appropriate distinction to be made is between which activities were investigative or fact finding in nature and those which constituted advice, legal or otherwise.

The Minister respectfully submits that those communications which are more appropriately characterized as advice, either written or oral, are at the very core of that which is proscribed by the Supreme Court of Canada's decision in *Keable*.

...

The Minister concedes that a Provincial Inquiry can inquire into those aspects of the handling of the s. 690 applications filed by Mr. Milgaard, subject to the constitutional limitations, based on the Supreme Court's decision in *McKeigan v. Hickman*, [1989] 2 S.C.R. 796.

However, the mandate of this Commission is only concerned with the s. 690 process as it existed at the time of Mr. Milgaard's applications. The Commission should be conscious of not only the constitutional limitations on its mandate in this regard, but the practical reality that the mercy process is much different now than it was at the time of Mr. Milgaard's applications. The relevant Criminal Code provisions have been significantly amended and the administration of mercy applications has been altered.

On May 30, 2006, the Commission received a written submission from the Government of Saskatchewan.²⁵ While acknowledging that *Keable* prohibited a provincial commission from undertaking a systemic inquiry into the conviction review process, it was submitted that *Keable* did not prohibit the Commission from inquiring into actions and decisions taken in respect of Milgaard's s. 690 applications. Saskatchewan made it clear that the Terms of Reference were generous and that it intended for the Commission to inquire into Milgaard's s. 690 proceedings:

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See <http://www.milgaardinquiry.ca/rulings.shtml>.
See <http://www.milgaardinquiry.ca/rulings.shtml>.

6. When establishing this Commission and formulating its terms of reference, Saskatchewan sought to imbue it with a scope of inquiry as generous as possible within accepted constitutional constraints. Saskatchewan wants the Commissioner to inquire into, and make recommendations about, all aspects of the administration of criminal justice in Saskatchewan which may have contributed to the wrongful conviction of David Milgaard. This would include actions taken by the Department of Justice (Canada) that might have affected decisions made by police, prosecutors and other justice officials in Saskatchewan about this matter. It is precisely for this reason that subject to the comments below, Saskatchewan submits the Commission has the constitutional authority to inquire into the operation of section 690 of the *Criminal Code* in the context of Mr. Milgaard's two applications.
- ...
10. The principles which emerge from *Keable* and subsequent authorities which applied it, demonstrate that this Commission does not lack authority to penetrate the walls of the Department of Justice (Canada), as it were. Saskatchewan submits that this Commission can investigate the various actions undertaken, and decisions taken by officials in the Department of Justice (Canada) subject to valid claims of solicitor/client or Crown privilege, in respect of the two applications under section 690 of the *Criminal Code* brought on behalf of Mr. Milgaard.
11. Saskatchewan does concede that following *Keable*, this Commission lacks the constitutional authority to embark upon a general systemic inquiry into the Department of Justice (Canada)'s policies, procedures and protocols respecting the operation of section 690 applications either at the time of Mr. Milgaard's two applications or at present.

Following oral submissions, I issued my ruling on June 1, 2006. No evidence had yet been heard from federal Justice witnesses. My ruling was a preliminary one and was intended simply to provide guidance to the parties. I addressed the narrow issue of whether questioning federal Justice witnesses on advice relating to Milgaard's s. 690 applications violated the *Keable* prohibition against inquiring into the administration and management of a federal institution. I did not attempt to set guidelines that would answer all possible future objections. I held that the proscribed areas of administration and management listed in *Keable* had nothing to do with advice concerning Milgaard's s. 690 applications or the Reference Case.

Starting on June 5, 2006, the Commission heard extensive evidence from federal Justice witness Eugene Williams. Williams was the lawyer primarily responsible for the investigation of Milgaard's two s. 690 applications. He discussed the information he obtained in the course of his investigation along with his assessment of its credibility. He also answered questions about his reasons for undertaking various steps in the investigation. Williams testified for seven days with legal counsel for the federal Minister present at all times and without any objection.

By Notice of Motion dated July 4, 2006, the Attorney General of Canada applied for judicial review of my June 1, 2006 ruling on the basis that I had exceeded my constitutional jurisdiction.²⁶ It was also argued that I had exceeded my statutory jurisdiction, notwithstanding the previous acknowledgement by the

federal Minister of the relevance of Milgaard's s. 690 proceedings to the Commission's mandate. The only issue argued before me and addressed in my June 1, 2006 ruling related to the limits on the questioning of federal Justice witnesses arising from constitutional limitations on a provincial inquiry. Before the Commission, and on the judicial review application, the federal Minister was represented by different legal counsel.

On August 18, 2006, Laing, C.J. issued his decision on the judicial review application.²⁷ He declined to rule on the issue of statutory jurisdiction, finding that it was my role in the first instance to interpret the Terms of Reference and determine issues of relevance. He noted that the federal Minister had not raised the Terms of Reference as an issue until the judicial review application.

On the issue of constitutional jurisdiction, Laing, C.J. held that the constitutional limitation identified by the Supreme Court in *Keable* precluded the Commission from asking federal Justice witnesses "questions which seek to probe the reasons behind actions, including questions about advice given or received" in the course of Milgaard's s. 690 proceedings.²⁸ My ruling was set aside. The application of Laing's ruling to the questioning of federal Justice witnesses was addressed by the Commission, with the input of legal counsel for the federal Minister, during testimony provided by witnesses Williams and Fainstein. The constitutional limitation was followed in the questioning of these witnesses to the satisfaction of legal counsel for the federal Minister.

The Commission heard extensive evidence regarding Milgaard's s. 690 proceedings from federal Justice lawyers Williams and Fainstein. Williams continued his testimony regarding the investigation of Milgaard's s. 690 applications. Fainstein testified about his involvement as legal counsel for the federal Minister in the Supreme Court Reference Case and in subsequent efforts to have DNA testing done on Gail Miller's clothing.

Legal counsel for the federal Minister was present throughout the hearings and during the testimony of its witnesses. In addition, Williams applied for standing before the Commission and retained his own legal counsel. His August 18, 2006 application for standing was made on the basis of his expertise in connection with Milgaard's s. 690 applications, and his "genuine commitment to ensuring that the Commission can properly meet its Terms of Reference by receiving as complete as possible a picture of the section 690 process".²⁹ It was also prompted by a concern that his position and the federal Minister's position on certain legal and factual issues may not coincide in all respects.

The questioning of federal Justice witnesses on advice given in connection with Milgaard's two s. 690 applications was not permitted. Williams and Fainstein testified to their involvement in Milgaard's s. 690 proceedings, including the reasons for their actions, without objection by legal counsel for the federal Minister. The record reflects that the Commission was careful to respect the constitutional limitations affecting the scope of its inquiry.

(d) Position of the Federal Minister

In written and oral submissions made by the federal Minister at the conclusion of the public hearings, the Commission's ability to inquire into Milgaard's s. 690 proceedings was challenged. On the issue of statutory jurisdiction, the federal Minister submitted that:

27 Supra note 5. See also http://www.milgaardinquiry.ca/pdf/Judgment_August_18_2006.pdf.

28 Ibid at 224.

29 See <http://www.milgaardinquiry.ca/rulings.shtml>.

The Terms of Reference at the Milgaard Inquiry provide no express authority to inquire into Mr. Milgaard's s. 617/s. 690 process, the Supreme Court reference or the release of David Milgaard.³⁰

The federal Minister also asserted that the Commission should not comment on the current process for conviction review as "the Mercy provisions have changed substantially" since Milgaard's applications were considered and "the evidence about the current process was not comprehensive enough to effectively make informed recommendations".³¹

The position taken by the federal Minister in its final submissions on the limited statutory jurisdiction of the Commission was at odds with both the role played by the federal Minister in the Inquiry process as a party with standing, and with earlier acknowledgements by the federal Minister of the relevance of Milgaard's s. 690 proceedings to the Commission's mandate.

The Terms of Reference granted to the Commission are broad in scope and clearly encompass an inquiry into all aspects of Milgaard's wrongful conviction, including the process by which his conviction was ultimately overturned. Saskatchewan played a significant role in that process, as it was asked to take an active role in defending the conviction before the Supreme Court of Canada in 1992. On the scope of the Terms of Reference, Saskatchewan stated:

... The Milgaard Inquiry was established by the Government of Saskatchewan through Order-in-Council 84/2004 to ascertain what went wrong in the investigation and subsequent prosecution of David Milgaard that resulted in his wrongful conviction for the murder of Gail Miller, and subsequent incarceration for approximately 23 years. This case cast a shadow over the administration of criminal justice in this province. As Wilson J. stated in *MacKeigan v. Hickman*, when the justice system "in some way went awry" by convicting an innocent person of a heinous crime, "it is obviously a matter of great public concern". The Government of Saskatchewan determined that a public commission of inquiry should be established to inquire into any and all matters relevant to the wrongful conviction of Mr. Milgaard and his subsequent incarceration.³²

In final submissions, the federal Minister conceded that the Supreme Court decision in *MacKeigan* appears "to permit recommendations about the s. 617/s. 690 process" but asserted that the *MacKeigan* decision was inapplicable because the terms of reference for the Marshall Commission were much broader.³³ This argument fails to recognize that the terms of reference for the Marshall Commission, given their widest interpretation, could only encompass matters within the jurisdiction of the provincial legislature. The Terms of Reference given to this Commission could not be more generous. They clearly indicate that the Government of Saskatchewan sought to imbue the Commission with the full scope of its jurisdiction in relation to criminal justice.

The Commission acknowledges that its inquiry was not unlimited in scope. The only case it was empowered to review was Milgaard's. The Commission is aware that the process of conviction review in Canada has changed. The Commission is also aware that it was not permitted to embark on a general systemic inquiry into the Department of Justice (Canada) policies, procedures and protocols respecting

30 See <http://www.milgaardinquiry.ca/finalsubmissions/341135.pdf> at para. 239.

31 Ibid at para. 245-246.

32 See <http://www.milgaardinquiry.ca/pdf/SkJusticeMemorandumofLaw.pdf> at para 8.

33 Supra note 30 at para 237.

the operation of s. 690 (now ss. 696.1 to 696.6), either at the time of Milgaard's two applications or at present. No witnesses were called for the specific purpose of providing evidence on the current conviction review process set out in ss. 696.1 to 696.6 of the *Criminal Code*.

Despite these limitations, the Commission is able to provide insight on how the conviction review process operated in Milgaard's case, and to comment on the desirability of changes to the process in Canada. The Commission heard extensive evidence on Milgaard's s. 690 proceedings as part of its valid provincial inquiry into the circumstances surrounding his wrongful conviction. No other public inquiry has examined a case in such detail, a case which was groundbreaking in many respects. It involved two applications for mercy and a reference to the Supreme Court of Canada. It also prompted the federal Minister to acknowledge the need for reform of the conviction review process.

It appeared from the testimony of Justice Canada lawyer Williams and from a reading of the current legislation, that changes made since review of Milgaard's case have not fundamentally altered the process or addressed all of the problems he faced.

The federal Minister, as a party with standing, participated fully in the Commission's proceedings. A Justice Canada witness provided extensive testimony relating to Milgaard's s. 690 proceedings. Counsel for the federal Minister expressed a desire to assist the Commission with its work and pledged cooperation. With respect, for the federal Minister to now say that the Commission is not able to inquire into Milgaard's s. 690 process, and is not qualified to comment on the conviction review process because only his case was examined, is not only inconsistent but ignores the wide scope of this Public Inquiry.

In making recommendations for the better administration of criminal justice in the province, I would be remiss if I failed to address the conviction review process in Canada.

3. The Canadian System of Conviction Review

(a) Historical Review

Historically, the only power to revisit a criminal conviction after appeal was found in the Royal Prerogative of Mercy which enabled the Crown to pardon offenders, reduce the severity of criminal punishments, and correct miscarriages of justice.³⁴

As explained by Gary Trotter in "Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review", the Royal Prerogative of Mercy has been used to achieve different objectives: ... first, to show compassion by relieving an individual of the full weight of his or her sentence and second, to correct errors in the judicial process such as wrongful convictions.³⁵ The power to dispense the Royal Prerogative of Mercy was transmitted into Canadian law through the office of the Governor General. In *The Attorney General (Canada) v. The Attorney General of the Province of Ontario*, the Supreme Court of Canada said:

By the law of the constitution, or in other words, by the common law of England, the prerogative of mercy is vested in the crown, not merely as regards the territorial limits of the United Kingdom, but throughout the whole of Her Majesty's Dominions. The authority to

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See <http://canada.justice.gc.ca/en/ps/ccr/index.html>.

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(2001) 26 Queen's L.J. 339.

exercise this prerogative may be delegated to viceroys and colonial governors representing the crown.³⁶

When Canada's first Criminal Code was enacted in 1892, it recognized the potential for miscarriages of justice and provided a legislative remedy by codifying one aspect of the prerogative.³⁷ The power to revisit a criminal conviction was codified in s. 748 which read as follows:

748. If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising Her Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such court as he may think proper.

Since 1892, the statutory power of the federal Minister to review criminal convictions after all appeals have been exhausted has gone through a number of revisions. By 1927, s. 748 had become s. 1022:

1022. Nothing in the ten last preceding sections of this Act shall in any manner limit or affect His Majesty's royal prerogative of mercy.

2. Upon any application for the mercy of the Crown on behalf of any person convicted on indictment, the Minister of Justice,

(a) if he entertains a doubt whether such person ought to have been convicted, may, after such inquiry as he thinks proper, instead of advising His Majesty to remit or to commute the sentence, direct by an order in writing a new trial at such time and before such court as the Minister of Justice thinks proper; or

(b) may, at any time, refer the whole case to the court of appeal, and the case shall then be heard and determined by that court as in the case of an appeal by a person convicted; and

(c) at any time, if the Minister of Justice desires the assistance of the court of appeal on any point arising in the case with a view to the determination of the petition, he may refer that point to the court of appeal for its opinion thereon, and that court shall consider the point so referred and furnish the Minister of Justice its opinion thereon accordingly.³⁸

The original "entertains a doubt" standard for granting a remedy remained in this section. However, the Minister's powers were broadened to include the power to refer cases to the Court of Appeal for hearing and determination, or for determinations on points arising in the case.

By 1955, the provision governing conviction review began to take on a modern form. Section 1022 of the *Criminal Code* became s. 596, and the "entertains a doubt" standard was removed and replaced with more ambiguous language that granted authority to the Minister of Justice to "direct, by order in writing, a new trial before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial should be directed":

36 (1894) 23 S.C.R. 458 at 469.

37 *The Criminal Code, 1892*, S.C. 1892, c. 29.

38 *Criminal Code*, R.S.C. 1927, c. 36.

596. The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment,

- (a) direct, by order in writing, a new trial before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial should be directed;
- (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person; or
- (c) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.³⁹

By 1970, s. 596 was amended and re-enacted as s. 617 of the *Criminal Code*:

617. The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXI,

- (a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;
- (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or
- (c) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.⁴⁰

(b) Section 690 of the *Criminal Code* as it Applied to David Milgaard

As part of broad revisions to the *Criminal Code* in 1985, s. 617 was re-enacted as s. 690.⁴¹ With the exception of a reference to "Part XXIV" instead of "Part XXI", s. 690 was virtually identical to its predecessor. Section 690 came into force on December 12, 1988. Both of Milgaard's applications to the federal Minister of Justice for review of his conviction were made under s. 690 of the *Criminal Code*. Section 690 remained in effect until it was revised and replaced in 2002 with ss. 696.1 to 696.6 of the *Criminal Code*.⁴²

690. The Minister of Justice may, on an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXIV,

39 *Criminal Code*, S.C. 1953-54, c.51.
40 *Criminal Code*, R.S.C. 1970, c. C-34.
41 *Criminal Code*, R.S.C. 1985, c. C-46.
42 *Supra* note 2.

- (a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;
- (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or
- (c) refer to the court of appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

Milgaard first applied to the federal Minister for a review of his 1970 murder conviction on December 28, 1988. His application was denied by the Minister on February 27, 1991. His second application was made on August 14, 1991. Subparagraphs 690 (b) and (c) allowed the federal Minister to refer the matter to the Saskatchewan Court of Appeal for a new appeal or for the opinion of the court on any question. Milgaard's trial counsel, Tallis, was a member of the Saskatchewan Court of Appeal, effectively precluding a reference to that court. On November 28, 1991, the Governor General, on the recommendation of the Minister of Justice, referred Milgaard's case to the Supreme Court of Canada for a hearing pursuant to s. 53 of the *Supreme Court Act*. The Court was asked to provide its opinion on whether Milgaard's continued conviction constituted a miscarriage of justice and if it did, what was the appropriate remedy.

On April 14, 1992, the Supreme Court of Canada released its decision in the Reference Case. The Court held that Milgaard had not proven his innocence. However, the Court concluded that fresh evidence, particularly in relation to the Fisher rapes, might affect the verdict. The Court recommended to the Minister of Justice that she set aside the conviction and direct that a new trial be held. The federal Minister complied.

On April 16, 1992, the Attorney General of Saskatchewan filed an indictment, charging Milgaard with second degree murder. However, the province elected not to proceed with a new trial. Instead, on the same day, a stay of proceedings was entered by the provincial crown in *Her Majesty The Queen v. David Milgaard*. David Milgaard was released from jail. The provincial Justice Minister stated that an inquiry would not be ordered, nor would compensation be offered to David Milgaard as his innocence had not been established.

Three significant features of the s. 690 process emerged from the Commission's review of Milgaard's case:

1. Milgaard had the onus of investigating his own wrongful conviction, identifying credible grounds and providing those grounds to the federal Minister together with supporting evidence. The federal Minister's role was limited to reviewing the grounds advanced. The federal Minister played no role in identifying potential grounds for a miscarriage of justice.
2. Although not expressly stated in s. 690, in order to obtain a remedy from the federal Minister, Milgaard had to establish a reasonable likelihood of a miscarriage of justice on the basis of new information or evidence that was not available at trial. This onus was very similar to the one Milgaard would have to meet if his case was allowed to be heard by the Court of Appeal.

3. Although the ultimate decision was made by the federal Minister, she relied heavily on the advice of federal Justice lawyers who investigated Milgaard's application on her behalf and on the advice of the Honourable William McIntyre Q.C., who she retained to advise her. The Minister never publicly disclosed the information given to McIntyre to review, nor the nature of the legal opinion sought and provided. The case was highly politicized and concerns were expressed at the time that political pressures might have influenced the Minister's decision.

Although Milgaard's second s. 690 application led to his release from prison in 1992, success owed more to publicity than to process.

It is my view that the publicity harmed the administration of justice, and that the process proved too daunting for the applicant and should be improved. The onus on the applicant is too heavy. He should not be expected to show factual innocence, and an independent and more transparent agency should investigate.

(i) Investigative Onus on Applicant/ Reactive Role of Federal Minister

On January 28, 1986, Milgaard wrote to Justice Minister John Crosbie from Stony Mountain Institution. His letter said that he had been in prison for 17 years for a crime that he did not commit. He also told the Justice Minister that he had decided not to eat or drink until he was a free man. He asked the Justice Minister to look at his case and end his ordeal. On March 11, 1986, Milgaard received a reply from the office of the Minister of Justice. He was informed that he could make an application for mercy to the Minister of Justice, who had the power to order a new trial or appeal proceeding:

If you have not exhausted the court process, you should do so. If you have and feel that yours is a compelling case, you may make an application to the Minister for relief. The following must be sent to the Minister: a brief fully detailing why you say that there was an injustice; copies of transcripts of the preliminary hearing and trial; copies of any judgments and reasons for judgment that were issued in your case; copies of any written arguments filed by the Crown and defence. On receipt of this material, your application will be duly considered.

If you wish the assistance of a lawyer and are unable to afford one, I would suggest you contact Legal Aid Manitoba, 402 - 294 Portage Avenue, Winnipeg, Manitoba, R3C 0B9.⁴³

As the letter from the Minister's office reveals, an applicant under s. 690 was required to provide extensive documentation to the Minister including the grounds for the alleged miscarriage of justice and supporting evidence. Milgaard's application was not submitted to the federal Minister until December 28, 1988, almost 19 years after his original murder conviction, and eight years after he and his mother first retained legal counsel and began their efforts to have the conviction set aside.

Milgaard was likely more fortunate than most applicants, in that his family provided him with financial support enabling him to retain counsel. Hersh Wolch was retained in January of 1986 and both s. 690 applications submitted on behalf of Milgaard were prepared by legal counsel. Despite requests to both Manitoba and Saskatchewan Legal Aid programs, neither provided financial assistance for conviction review applications.

The federal Minister's role under s. 690 was reactive as opposed to proactive. The federal Minister responded only to what was contained in the application, and did not proactively investigate Milgaard's conviction to identify any possible miscarriage of justice. The task of identifying possible grounds of miscarriage of justice was left to the applicant and his or her counsel.

As explained by Williams:

Q ... A convicted person can't come to you and say "lookit, I'd like you to investigate, I'm innocent, I don't know what went wrong but would you people please go and investigate this and find out why I was wrongfully convicted"?

A We would say to that person "that is not the role of the department or of the Minister". Certainly, if you've been through the process, sat in on your trial, heard the evidence, you're in the best position to identify to us what it is you say constitutes wrongful – or what the errors were and why they constitute a miscarriage of justice.

Q And what you are telling us, then, it would be incumbent upon Mr. Milgaard and/or his counsel to identify significant grounds that might provide a basis for a remedy under Section 690?

A Yes.

.....

Q Is there anything else – and we'll touch on this later, I don't want to limit you – but is there anything else, again in just trying to get an understanding of the nature and purpose of the investigation, that you would undertake on behalf of the Minister?

A Our job is to test or to examine the facts that were advanced; one, to ensure that it was accurate, and two, if there are any matters that required clarification, to clarify them. Next our job was to summarize that and based on a summary and on the information collected, to provide advice to the minister with respect to whether the grounds advanced and whether the information collected either signaled support for or not for the granting of a remedy. We took the role very, very seriously and we endeavoured to do it as quickly as we could, but as thoroughly as we could, because we recognize the importance of this particular procedure to someone who is sitting in a jail convicted of an offence.⁴⁴

(ii) Threshold for the Granting of a Remedy

Once over the threshold of getting the Minister to investigate the stated grounds, the investigation begins and the question arises as to what test is to be applied by the Minister in determining whether to grant a remedy to an applicant. The test was not set out in s. 690, so it was left to the Minister's discretion.

In his reasons for decision in the s. 690 application of W. Colin Thatcher, the Honourable Allan Rock said:

In creating the role of the Minister of Justice under section 690 of the Code, Parliament used very broad language, and the discretion of the Minister has been cast in the widest

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T32309-T32310; and T32321-T32322.

possible terms. Indeed, the section does not contain a statutory test, other than the general reference in clause (a) to the Minister being "satisfied that in the circumstances a new trial or hearing...should be directed."⁴⁵

In her February 27, 1991 letter denying Milgaard's first s. 690 application, the federal Minister commented on the test that had been employed "in the past" in evaluating an application for conviction review:

Section 690 of the Criminal Code provides that the Minister of Justice may direct a new trial if after inquiry the Minister is satisfied that in the circumstances a new trial is justified; similarly, the Minister of Justice may refer the case to an appellate court for hearing. The purpose of this procedure is to permit a review of cases where **new evidence or information raising doubts concerning the correctness of a conviction has arisen after the full judicial process**, including appeals, has been exhausted. I wish to emphasize that it is not the function of the Minister of Justice to retry the case. **The remedy is an extraordinary one, as the normal judicial process is designed to ensure that no miscarriage of justice has occurred.** Ministers of Justice traditionally have declined to act where the basis upon which the application has been brought relates to matters or issues which were considered by the jury at trial. For instance, relief is commonly declined where the applicant points to the unsavoury character of a witness when that issue was placed squarely before the jury. **Ministers of Justice have in the past intervened and referred the case to the courts where it can be demonstrated that a reasonable basis exists to conclude that a miscarriage of justice has likely occurred.**⁴⁶

Williams stated that the test set out in the federal Minister's letter was the one applied to Milgaard's application. Proof of innocence was not the criterion although the Milgaards at times believed that they needed to show that.

Williams testified:

A At the time the ministers were prepared to grant a remedy where the evidence brought forward established a reasonable basis to conclude that a miscarriage of justice likely occurred. That was, let's say, the word or the attempt to articulate what the standard was. Certainly as you pointed out in your, in your outline, if there were doubts concerning the correctness of the conviction, those doubts had to reach a certain threshold **and it was that if you had a factual foundation where it was probably, more probable than not that there was a miscarriage of justice**, you didn't have to prove that you were innocent or probably innocent, but you had to establish that there was something that was significant that could have affected the outcome had it been known; for example, fresh evidence, new scientific advances that may now cause a court to look at evidence from a completely different perspective and which might signal either that the evidence didn't have the strength that it was given at trial or may be now exculpatory or inculpatory. DNA is a huge

45 Reasons for Decision of the Minister of Justice on Application by W. Colin Thatcher, released April 14, 1994, Dept. of Justice.
46 DocId 001529.

example of advancement in science which could be the basis for a successful return of a case back to the courts.⁴⁷

According to the Minister's letter and to the evidence of Williams, Milgaard had to establish that a miscarriage of justice likely occurred in order for the Minister to act. This test is very similar to that which would be applied by an appellate court hearing Milgaard's case on a reference by the federal Minister. In other words, before being granted the opportunity to have his conviction reviewed by the appeal court on the basis of fresh evidence, Milgaard effectively had to satisfy the Minister that he would succeed before the appeal court.

In written submissions filed with the Supreme Court on the Reference Case, the federal Minister described the standard governing the Minister's decision to send a matter back for further adjudication by the courts pursuant to s. 690:

It is respectfully submitted that the threshold standard he must meet is proof on a balance of probabilities that a miscarriage has occurred. Anything less would not comport with the foregoing principles – the presumption of validity; respect for the integrity of the conventional process of trial and appeals; and the extraordinary nature of the prerogative process. Common sense commends the view that the Applicant can only secure relief where it can be demonstrated that a miscarriage of justice has, more likely than not, occurred. If it is not probable that what he asserts is correct, there is no basis for the special intervention that he seeks.⁴⁸

The federal Minister also stated in written submissions before the Supreme Court that the prerogative power under s. 690 must be exercised with great caution. Otherwise, public confidence in the system would be undermined if the process were allowed to become just another level of appeal.

(iii) Political Decision Maker

The decision whether Milgaard would be allowed to go back to Court to challenge his conviction was made by the federal Minister of Justice, Kim Campbell. Her decision was based on advice from federal Justice lawyers, and in particular, Eugene Williams. She also sought the advice of outside counsel, retired Supreme Court Justice William R. McIntyre, Q.C.

Through the s. 690 process, the federal Minister of Justice became involved in individual cases through the exercise of the Royal Prerogative of Mercy. This involvement invited accusations of political influence from parties unhappy with a decision.

Section 690 provided that Milgaard had to apply to the federal Minister for "the mercy of the Crown". Commentators criticized the link between the conviction review process and the notion of mercy evident in the language of s. 690. In his article "Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review", Gary Trotter said:

...while it is tenable to suggest that one cannot claim an *entitlement* to mercy to ameliorate punishment for reasons of compassion, that suggestion is objectionable when the basis is lack of legal guilt. We have meaningful standards of fault because they are foundational

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T32290-T32291.
Docid 020321 at 326.

to our modern conceptions of a fair criminal justice system. They do not operate as a charity...⁴⁹

It is one thing to ask the sovereign for mercy, having committed a crime, but quite another to ask a Minister of the Crown to involve herself in an individual case where proof of the crime is still in question.

(c) Changes to the Section 690 Process Between 1992 and 2002

Following the 1992 Supreme Court Reference in *Milgaard's* case, and prior to the replacement of s. 690 with ss. 696.1 to 696.6 in 2002, several non-legislative changes were made to the s. 690 process. Those changes were outlined in detail by the federal Minister in a 1998 Consultation Paper entitled "Addressing Miscarriages of Justice: Reform Possibilities for s. 690 of the Criminal Code".⁵⁰ The stated purpose of the 1998 Consultation Paper was to examine the Canadian conviction review process and explore ways to improve it.

The 1998 Consultation Paper indicated that in 1993 the Department of Justice conducted an internal review, in an attempt to enhance the efficiency of the s. 690 process. As a result, the following steps were initiated: a case management system was implemented, additional lawyers were hired, the Criminal Conviction Review Group (whose sole function was to investigate s. 690 applications and report to the Minister) was established, timelines were instituted, the CCRG was transferred to the policy sector, and a booklet was published outlining the required documents, guidelines and process by which one could apply for an s. 690 review.

In 1994 the Honourable Allan Rock released his decision in the s. 690 application of *W. Colin Thatcher*.⁵¹ This decision articulated, for the first time, the principles which would guide the Minister's exercise of the discretionary power found in s. 690. Although the test was still not enunciated in legislation, the decision expressly stated that in order to succeed under s. 690 an applicant would need to demonstrate that there was a reasonable basis to conclude that a miscarriage of justice had likely occurred. The Thatcher case marked the first time that the federal Minister provided an s. 690 applicant with a copy of the investigative summary containing information gathered by departmental counsel in assessing the s. 690 application.

The Consultation Paper explained that a standard procedure had been in place, since 1994, to assist the Minister of Justice in the review of s. 690 applications. Once an applicant had provided the necessary documents to the Minister of Justice, the review process would begin. The review process was divided into the following four stages:

Preliminary Assessment: At this initial stage, a member of the CCRG examines the information in the application and compares it with the trial and appellate records. There must be an "air of reality" to the allegations raised by the applicant. As a threshold, the applicant must disclose grounds that could lead to the conclusion that a miscarriage of justice likely occurred.

If the application reveals new and significant information that was not available at trial or on appeal that could have affected the outcome of the case, the application will go on to a full investigation. If not, the applicant is informed and provided with reasons why the intervention of the Minister is not warranted.

49 Supra note 35 at 346-347.

50 Supra note 1.

51 Supra note 45.

Investigation: During the investigation or evaluation of the application, the function of CCRG counsel is three-fold. First, counsel must verify all the information and evidence submitted in the application. Second, counsel may obtain any additional facts deemed necessary for a full investigation. This may involve interviewing witnesses and obtaining scientific tests or other assessments from forensic and social science specialists. Police agencies, prosecutors, defence and appellate counsel involved in the case may be consulted. In addition, the information obtained may raise issues other than those identified by the applicant. When this happens, the applicant will be asked to provide additional submissions to ensure that the matter is fully considered. Third, this process allows counsel to formulate a recommendation as to whether there is a basis to conclude that a miscarriage of justice likely occurred.

Investigative Summary: Counsel reviewing the application then organizes the results of the investigation into an investigative summary. This summary serves as the framework for informing the applicant, his or her counsel, and the Minister of the facts gathered during the investigation. The investigative summary is disclosed to the applicant for comments.

Recommendation and Ministerial Decision: Once the applicant's final submissions have been received and CCRG counsel have arrived at an informed conclusion regarding the applicant's eligibility for a section 690 remedy, legal advice is prepared for the Minister. The application, all submissions by or on behalf of the applicant, the investigative summary, and the CCRG's advice are then forwarded to the Minister for review and decision.

A number of options for reform of the conviction review system were considered and discussed in the 1998 Consultation Paper. In the result, the federal Minister decided to proceed with legislative amendments to the s. 690 process.

(d) Sections 696.1 to 696.6 of the *Criminal Code*

In 2002, s. 690 was repealed and replaced with ss. 696.1 to 696.6 of the *Criminal Code*.⁵² Regulations were also enacted outlining the requirements for an application as well as the procedure that is followed once an application has been completed.⁵³

The Minister's power to review convictions is set out in ss. 696.1 to 696.6 of the *Criminal Code*. The 2002 amendments did not fundamentally change the conviction review process from that applied to Milgaard's applications.

The reference to the notion of mercy as a basis for a remedy in s. 690 was removed. Section 696.1 now refers to applications for ministerial review on the grounds of miscarriage of justice, as opposed to applications for the mercy of the Crown.

The test is expressly stated in s. 696.3(3). The federal Minister may exercise his or her powers and grant a remedy if "satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred".

Section 696.4 sets out the considerations to be taken into account by the federal Minister. The federal Minister shall consider (a) whether the application is supported by new matters of significance, (b) the

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Supra note 2.

Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice, S.O.R./2002 – 416.

relevance and reliability of information that is presented in connection with the application, and (c) the fact that an application is not intended to serve as a further level of appeal and that any remedy granted is an extraordinary one.

Williams testified before the Commission that these amendments simply codified the considerations and the test he applied when he investigated the Milgaard applications.

The federal Minister was given the powers of a Commissioner under Part 1 of the *Inquiries Act*, providing investigative powers to those individuals investigating cases on the Minister's behalf, including powers such as issuing subpoenas, forcing the attendance of witnesses, compelling them to give evidence and to produce documents. Williams did not have these powers when he investigated Milgaard's application.

The amendments also require the Minister to provide the applicant with a copy of the investigation report prepared by federal Justice lawyers. The applicant has an opportunity to submit further information in support of the application within one year from the date the investigation report is sent. Although Williams did not share his investigation report with Milgaard's counsel, he met with them, shared the documentary record of his investigation and invited further submissions.

The Regulations provide details regarding the investigation and review process. An application form is now contained in the Regulations. The form requires the applicant to set out the grounds for the application and describe new matters of significance that support the application. There continue to be fairly onerous requirements placed upon the applicant regarding the provision of documents. An exhaustive list of required documents is set out in the Regulations. Only on provision of a completed application form and all documents listed in the Regulations will the review process begin.

Following the legislative changes in 2002, some non-legislative changes were implemented as well. The Minister's 2007 Annual Report states the following:

Following the legislative changes in 2002, a number of structural changes were made to enhance the arm's-length relationship between the CCRG and the Department of Justice.

The CCRG office is located outside of the Department of Justice Headquarters in a downtown Ottawa office building which has both government and private sector tenants.

Rather than formally passing through another branch of the Department, advice passes from the CCRG to the Minister through the Associate Deputy Minister's office.

Administration and support services are provided to the CCRG by this same office.⁵⁴

The position of Special Advisor was also created to oversee the conviction review process and give the Minister advice on applications for ministerial review which would be independent of that given by the CCRG. The 2007 Annual Report states the following:

The Special Advisor's position is an independent one. He is neither a member of the Public Service of Canada nor an employee of the Department of Justice. The Special Advisor is appointed by order-in-council from outside the Department and public service.

While the Special Advisor's main role is to make recommendations to the Minister once an investigation is complete, it is equally important that he provide independent advice at

other stages of the review process where applications may be screened out. The Special Advisor's involvement ensures that the review of all applications is complete, fair, and transparent.⁵⁵

While the changes have improved the conviction review process since Milgaard, the fundamental aspects have not changed. The process remains reactive. The federal Minister does not conduct a proactive investigation on receipt of an application, but rather relies on the applicant, lacking in investigative expertise, to identify the grounds for an alleged miscarriage of justice. The test for the exercise by the Minister of his or her discretion to refer a matter to the Court system has not changed. Finally, the decision as to whether a convicted person can have access to the Court to challenge a conviction still lies with the federal Minister, an elected politician.

4. Improvements to the Conviction Review Process in Canada

While it is true that the Commission has only examined the case of Milgaard, his is one of the most well known cases of wrongful conviction in Canada, engaging virtually every aspect of the s. 690 process and involving two separate applications and a reference to the Supreme Court of Canada. The Commission heard significant evidence about his struggles through the conviction review process to obtain a remedy, and also about the role of the province in those proceedings. Although a number of public inquiries examining wrongful convictions have commented on the conviction review process, it can be said that none has examined a case in the same detail. The federal Minister of Justice was a party with standing before the Commission and participated fully in the inquiry process.

There is the potential for much to be learned from Milgaard's case, as it presented significant challenges to the justice system in this country. The conviction review process has been changed since the Milgaard case, but the *Criminal Code* amendments in 2002 did not fundamentally alter it because, for the most part, the amendments simply codified practices and policies in place during the time of Milgaard's s. 690 applications. There remains much to be learned from his experience.

The weaknesses in the criminal justice system which failed Milgaard still exist and can never be entirely eliminated. What is possible however, is an improved response to claims of wrongful conviction. While my recommendations do not bind the federal government, I still am able to comment on the desirability of changes to the law and to the manner in which criminal justice is administered. The conviction review system in Canada is premised on the belief that wrongful convictions are rare and that any remedy granted by the federal Minister is extraordinary. Change is needed to reflect the current understanding of the inevitability of wrongful convictions and the responsibility of the criminal justice system to correct its own errors as I will fully explain later. It is my recommendation that the investigation of claims of wrongful conviction be handled by a review agency independent of government and that the independent review agency, not the federal Minister, act as the gate-keeper. Four public inquiries in this country have already identified the need for substantial change. This will be the fifth.

The Commission's review of David Milgaard's case identified a number of important issues related to Canada's conviction review process:

- (a) What is the definition of "wrongful conviction" and what role should factual innocence play in conviction review proceedings?

- (b) What role should compensation for wrongfully convicted persons play in conviction review proceedings?
- (c) What is the appropriate role of the appellate courts in conviction review proceedings?
- (d) Is the present system of conviction review responsive enough for the early detection of wrongful convictions? Should the onus be on the convicted person to identify new information that would support a return to the appellate court, or should there be an agency or institution to undertake this task?
- (e) Is the federal Minister the appropriate gatekeeper to decide whether a conviction should be returned to the Court of Appeal for review and what is the threshold that should be met to return a case to the court?

(a) Wrongful Conviction, Miscarriage of Justice and Factual Innocence

There is presently no settled definition of the term wrongful conviction. A wrongful conviction is sometimes equated with a miscarriage of justice. However, a wrongful conviction has also been described as a "sub-category of the broader concept of a miscarriage of justice".⁵⁶

The term wrongful conviction is not used in the *Criminal Code*. The term that is generally used in Canadian criminal law is "miscarriage of justice" which is both a ground for allowing an accused's appeal from a conviction under s. 686(1)(a)(iii) of the *Criminal Code* and a ground for the federal Minister to grant a remedy on conviction review. In the federal Minister's 2007 Annual Report on Applications for Ministerial Review – Miscarriages of Justice, we read:

When an innocent person is found guilty of a criminal offence, there has clearly been a miscarriage of justice. A miscarriage of justice may also be suspected where new information surfaces which casts serious doubt on whether the applicant received a fair trial. Thus, the Minister's decision that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in a case does not amount to a declaration that the convicted person is innocent. Rather, such a decision leads to a case being returned to the judicial system, where the relevant legal issues are determined by the courts according to law.⁵⁷

I do not favor a definition of wrongful conviction limited to those who are factually innocent of the crime with which they were convicted. The circumstances in which a conviction can be said to be wrongful are much wider than this. In this regard, I prefer the view expressed by David Kyle, formerly of the CCRC, that wrongful conviction refers to circumstances in which a conviction has been found to be unsafe and has therefore been set aside. He provided the following testimony at the Inquiry:

Q. Can I ask your comment, or your understanding or your description of two terms that we see in the literature and in the cases, and they are the term wrongful conviction and miscarriage of justice.

A. Uh-huh.

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Kent Roach, "Report Relating to Paragraph 1(f) of the Order in Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell". See http://www.driskellinquiry.ca/pdf/final_report_jan2007.pdf.

57

Supra note 54.

Q. And what do those terms mean to you?

A. Well, I think that the term miscarriage of justice is used quite loosely by people who are considering matters in this area. It's quite interesting I think that the term miscarriage of justice no longer appears anywhere in the 1995 Criminal Appeal Act and indeed the one reference in the 1968 act I think to miscarriage of justice, which was the old proviso test which the Court of Appeal applied, has gone, and from the Commission's point of view, I think that's an extremely good thing because what we're concerned about is not debating the meaning of miscarriage of justice, but considering, on an objective-evidence based, on a – from an objective-evidence based point of view whether or not a person has been rightly or wrongly convicted, so to me, expressing myself from the point of view as a former member of the Commission, **wrongful conviction means either somebody who has been convicted of an offence which that person didn't commit at all, which is what I would describe as someone being innocent in the absolute sense, but equally I regard as a wrongful conviction a situation where somebody who has been convicted of an offence in relation to that person either significant relevant new evidence comes to light subsequently which had it been known to and taken into account by the jury at the trial may have altered their decision as to being sure of the Defendant's guilt or, alternatively, that the process by which the person was convicted was flawed in some significant respect such that it can be said that that person was not fairly convicted in the sense of the proper application of the burden and standard of proof and the proper application of the rules and evidence of procedure which the prosecution is obliged to adhere to in seeking a conviction.**

Q. And again, in your view, then, does a person have to demonstrate or establish factual innocence or innocence in the absolute sense to establish that he has been wrongfully convicted?

A. Not from the point of view of the application to the Commission's test in deciding whether there is a real possibility that the Court of Appeal might find that conviction to be unsafe. I mean, I would make the general observation that whilst, if you do have a situation and you may not ever know whether you do or don't have a situation, but if you do have a situation where someone is innocent in the absolute sense, it would, of course, be very desirable and very gratifying if that could actually be established, **but the reality is that that rarely can be established, it's very rare indeed when carrying out investigations into a conviction which is alleged to be a wrongful one to find wholly-exonerating evidence.** In the great majority of instances where the Commission has referred cases to the Court of Appeal it has been on the basis of that other category of wrongful conviction which I've just described.⁵⁸

Courts do not concern themselves with factual innocence. As stated in "The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken":

[A] criminal trial does not address "factual innocence". The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is found not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of the criminal law.⁵⁹

In two recent decisions, the Ontario Court of Appeal confirmed that it had no jurisdiction to declare factual innocence as a remedy. Both cases involved appeals referred to the court by the federal Minister under s. 696 of the *Criminal Code*. In *R. v. Truscott*, the Court allowed Truscott's appeal, set aside the conviction against him and entered an acquittal.⁶⁰ The subject of factual innocence was discussed by the Court as Truscott's legal counsel asked that the Court not only acquit him but declare him innocent. The Ontario Court of Appeal noted the lack of a statutory basis in Part XXI of the *Criminal Code* for making such a declaration, and commented that establishing factual innocence can be a most daunting task absent definitive forensic evidence such as DNA.

The concept of factual innocence was also considered by the Ontario Court of Appeal in the case of *Her Majesty the Queen v. William Mullins-Johnson*.⁶¹ Mullins-Johnson was convicted of the first degree murder of his four year old niece. He spent 12 years in jail from the time of his arrest until he was released on bail. He protested his innocence throughout. On July 6, 1997, the federal Minister directed a reference to the Ontario Court of Appeal pursuant to s. 696.3(3)(a)(ii) of the *Criminal Code*, to determine Mr. Mullins-Johnson's case as if it were an appeal on the issue of fresh evidence. Legal counsel for Mullins-Johnson suggested that this was an appropriate case for the Court to make an order tantamount to a declaration of factual innocence. In declining to do so, the court stated:

The fresh evidence shows that the appellant's conviction was the result of a rush to judgment based on flawed scientific opinion. With the entering of an acquittal, the appellant's legal innocence has been re-established. The fresh evidence is compelling in demonstrating that no crime was committed against Valin Johnson and that the appellant did not commit any crime. For that reason an acquittal is the proper result.

There are not in Canadian law two kinds of acquittals: those based on the Crown having failed to prove its case beyond a reasonable doubt and those where the accused has been shown to be factually innocent. We adopt the comments of the former Chief Justice of Canada in *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken*, Annex 3, pp. 342:

[A] criminal trial does not address "factual innocence". The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is found not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of criminal law.

Just as the criminal trial is not a vehicle for declarations of factual innocence, so an appeal court, which obtains its jurisdiction from statute, has no jurisdiction to make a formal legal declaration of factual innocence. The fact that we are hearing this case as a Reference

59 The Right Honourable Antonio Lamer, "The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken" (Newfoundland and Labrador, 2006), Annex 3 – Ruling on the Terms of Reference at 342.

60 2007 ONCA 575, 225 C.C.C. (3d) 321.

61 2007 ONCA 720, 228 C.C.C. (3d) 505.

under s. 696.3(3)(a)(ii) of the *Criminal Code* does not expand that jurisdiction. The terms of the Reference to this court are clear: we are hearing this case "as if it were an appeal". While we are entitled to express our reasons for the result in clear and strong terms, as we have done, we cannot make a formal legal declaration of the appellant's factual innocence.

In addition to the jurisdictional issue, there are important policy reasons for not, in effect, recognizing a third verdict, other than "guilty" or "not guilty", of "factually innocent". The most compelling, and, in our view, conclusive reason is the impact it would have on other persons found not guilty by criminal courts. As Professor Kent Roach observed in a report he prepared for the *Commission into Certain Aspects of the Trial and Conviction of James Driskell*, "there is a genuine concern that determinations and declarations of wrongful convictions could degrade the meaning of the not guilty verdict" (p. 39). To recognize a third verdict in the criminal trial process would, in effect, create two classes of people: those found to be factually innocent and those who benefited from the presumption of innocence and the high standard of proof beyond a reasonable doubt.⁶²

Factual innocence, although obviously the best reason for remedying a wrongful conviction, should have no necessary role in the conviction review process. It needlessly complicates the detection and remedying of wrongful convictions and sets the bar too high for obtaining a remedy. The focus on factual innocence in the conviction review process ultimately hurt David Milgaard and prolonged his incarceration, which ended only following the decision of the Supreme Court of Canada in 1992.

(b) Compensation

Following the decision of the Supreme Court of Canada in 1992, Milgaard was released from prison. He was not compensated at that time, his innocence not having been established.

On September 19, 1992, Joyce Milgaard, David Milgaard and Hersh Wolch held a news conference alleging wrongdoing and cover-up by police and Saskatchewan Justice officials. In response to those allegations, the RCMP commenced the Flicker investigation in November 1992. In 1993, Milgaard sought compensation through a civil action against various members of the police and prosecution service, alleging breach of the duty of disclosure, negligence, and wrongdoing. In 1995, he filed a defamation claim against Saskatchewan Justice Minister Bob Mitchell. As reported in a *Globe and Mail* article, Mitchell allegedly stated in relation to Milgaard: "I think he was properly convicted. I think he did it."⁶³

On July 18, 1997, DNA test results were released. The Saskatchewan Minister of Justice publicly stated that Milgaard had been wrongfully convicted of the murder of Gail Miller and that a miscarriage of justice had occurred. An apology was made to Milgaard and to his family. On May 17, 1999, the Saskatchewan Minister of Justice announced that a settlement on compensation had been reached, the total value of which was \$10 million. The federal government contributed the sum of \$4 million to the compensation package.

The issue of compensation for Milgaard has been resolved. It is not within my Terms of Reference to inquire into the questions of when or in what amounts compensation should be paid to the wrongfully convicted. However, in the course of inquiring into Milgaard's case, two matters related to the issue of compensation came to my attention that require comment.

62 Ibid at 511-512.
63 Docid 164842.

Firstly, it became clear to me that it is essential to keep concerns relating to compensation out of the conviction review process. It is a mistake to attempt to use the criminal process as a vehicle for obtaining declarations of factual innocence in order to lay the groundwork for a compensation claim. The conviction review process must not be hampered by either the wrongfully convicted individual's desire to receive compensation, or, a desire on the part of the authorities to avoid payment. The only concern of participants in conviction review must be the safety of the conviction. Preoccupation with factual innocence makes it more difficult for the wrongfully convicted to obtain a remedy and, ultimately, liberty. The fundamental concern of the conviction review process must be that those who are wrongly convicted and imprisoned regain their freedom.

At the Inquiry, David Kyle testified that the CCRC does not concern itself with questions of innocence or guilt. The only concern of the CCRC is to determine whether there is a real possibility that a conviction would not be upheld by an appeal court. If innocence was a consideration, the test for obtaining a remedy would ultimately be much harder to meet. Kyle expressed his view that issues of compensation and the safety of the conviction must be kept entirely separate:

...And I hope that if, sort of, one thing stands out from the evidence that I have been giving to this Commission, I think the two questions are entirely separate. Whether or not somebody has been wrongfully convicted, I think, is a matter of quite wide interpretation, as I was endeavoring to explain yesterday. Whether someone who has been wrongfully convicted is entitled to compensation is an entirely separate question, and that's a matter for which the criteria can be set as a wholly distinct exercise and, as it happens, the legislation in the *Criminal Justice Act 1988*, I think, is being treated by the Home Secretary as effectively saying 'compensation will be paid if I'm satisfied beyond reasonable doubt that this applicant is factually innocent, and not otherwise.'

...

...I think the question of whether – there is much – there is much more to being – having a record of a conviction against you, in terms of its impact on your life generally, than the question whether you should – whether you get any monetary compensation for having been prosecuted in the first place. And if you haven't been rightly convicted in the wider sense, as I was describing it yesterday, then you should not have that conviction recorded against you because of the impact it is likely to have on virtually the whole aspect of – virtually every aspect of your life.⁶⁴

Secondly, in my view (contrary to the English position), proof of factual innocence should not be a sine qua non for entitlement to compensation. It is too hard to prove, and official wrongdoing or egregious error leading to wrongful conviction should in themselves be compensable.

A further aspect of compensation is public exoneration through a declaration of factual innocence. This should be left to the Executive and not the courts, for reasons explained above. Neither should it be expected of commissioners conducting public inquiries into wrongful convictions, unless their terms of reference call for consideration of such a finding.

AIDWYC submits that an acknowledgment of factual innocence is important to the wrongly convicted for several reasons. Firstly, for the wrongly convicted, there is nothing as important as public recognition of factual innocence. In its submissions before Commissioner Lamer in Newfoundland, AIDWYC stated:

The harder truth, however, is that, in the public eye, there is a terrible disconnect, a moral chasm, between 'legal' and 'factual' innocence, between a finding of 'not guilty' and a declaration of 'wrongly convicted'.⁶⁵

Secondly, AIDWYC notes that factual innocence is important in the assessment of whether compensation should be payable, and in what amount. In Canada, it is often the case that compensation is not paid to individuals who have suffered as a result of a wrongful conviction, unless factual innocence can be established.

Given the need to establish factual innocence for compensation, courts have been asked to make declarations of factual innocence. So far, as the cases of *Truscott* and *Mullins-Johnson* demonstrate, they have been unwilling to do so for public policy reasons and lack of jurisdiction, declaring that the criminal process is "not a vehicle for declarations of factual innocence".⁶⁶

Many writers have criticized the idea of establishing factual innocence as a criterion for compensation because it detracts from the integrity of the presumption of innocence.

An often cited article on the topic of compensating the wrongly convicted is H. Archibald Kaiser's article entitled "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course".⁶⁷ Kaiser states that his article is focused on the special problems raised by the cases of individuals most grievously wronged in the Canadian criminal justice system: those who have been in prison following a criminal conviction (and an unsuccessful appeal), where the verdict later turns out to have been reached in error. His article deals with the question of how these individuals should be compensated, given that most people would view them as victims of a miscarriage of justice. His thesis is that a more liberal approach to compensation than has as yet been adopted by the federal and provincial governments should be implemented.

Kaiser discusses the Federal and Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons which were adopted by provincial and federal Ministers of Justice.⁶⁸ These guidelines are not legislatively enacted by any level of government. It was recently noted by Commissioner LeSage in the Driskell Report that these guidelines are presently under review.⁶⁹ The Guidelines state that "compensation should only be granted to those persons who did not commit the crime for which they were convicted (as opposed to persons who are found not guilty)." In arguing that a more liberal approach should be taken to compensation, Kaiser says:

It is argued that persons who have been wrongfully convicted and imprisoned are *ipso facto* victims of a miscarriage of justice and should be entitled to be compensated.
To maintain otherwise introduces the third verdict of "not proved" or "still culpable" under

65 Written submissions of the Association in Defence of the Wrongfully Convicted (AIDWYC) Re Commission's Terms of Reference dated October 17, 2003, filed with the Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons and Randy Druken.

66 Supra note 61 at 512.

67 (1989) 9 Windsor Y.B. Access Just. 96.

68 Guidelines for Compensation for Wrongfully Convicted and Imprisoned Persons, undated.

69 Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (Manitoba, 2007) at 144. see also <http://www.driskellinquiry.ca/>.

the guise of a compensatory scheme, supposedly requiring higher threshold standards than are necessary for a mere acquittal. As Professor MacKinnon forcefully maintains:

...one who is acquitted or discharged is innocent in the eyes of the law and the sights of the rest of us should not be set any lower... There is a powerful social interest in seeing acquitted persons do no worse than to be restored to the lives they had before they were prosecuted.⁷⁰

In a paper delivered in June 2005 to the AIDWYC conference, former Justice Marshall argued that while factual innocence would obviously bring an individual within the ambit of the wrongly convicted, it would be unfair and dangerous to so limit the definition:

This paper argues that redress for the wrongly convicted should extend beyond the confines of factual innocence to at least instances where the miscarriage of justice has been materially influenced by egregious error or conduct by officers or agents of the state.⁷¹

In his report on the Driskell Inquiry, Commissioner LeSage noted that the term wrongful conviction was used by Professor Roach "to describe actual/factual innocence, as opposed to legal innocence where the Crown merely fails to discharge its burden", and stated his own view that the term wrongful conviction ought not to be equated exclusively with factual innocence.⁷²

While I am of the view that compensation should remain within the purview of the Executive, a criterion of factual innocence as the basis for paying compensation seems unduly restrictive. At one end of the scale, a wrongful conviction can result from trial errors, investigative oversight, and a host of other reasons short of official wrongdoing, which have not traditionally been regarded as calling for compensation. At the other end, a wrongful conviction can mean that an innocent person was convicted and where this has been shown, compensation has followed in many cases. Between these extremes, wrongful convictions can result from a wide range of official misbehavior - from ethical breaches to criminal conduct. Where a miscarriage of justice has resulted from an obvious breach of good faith in the application of standards expected of police, prosecution, or the courts, the door to compensation should not be closed for lack of proof of factual innocence.

(c) Role of Appellate Courts in Conviction Review

The *Criminal Code* bestows power on provincial courts of appeal to overturn criminal convictions on a number of grounds including "a miscarriage of justice".

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

- (a) may allow the appeal where it is of the opinion that
 - (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

70 Supra note 67 at 139.

71 Supra note 10 at 6.

72 Supra note 69 at 139-142.

- (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
- (iii) on any ground there was a miscarriage of justice;

...

686(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

- (a) direct a judgment or verdict of acquittal to be entered; or
- (b) order a new trial.

Appeal courts also have the power to hear "fresh evidence" on an appeal from a conviction (s. 683(1)). The Supreme Court of Canada stated the principles in *Palmer v. the Queen*:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.⁷³

Provincial courts of appeal cannot declare factual innocence, but in setting aside a wrongful conviction they restore to the appellant the presumption of innocence, a legal concept relating to the maxim that every accused is presumed innocent until proven guilty beyond a reasonable doubt.

Appeal courts usually deal with convictions soon after they are entered, but in most cases of wrongful conviction, new information providing a basis to challenge the conviction becomes known only after all appeals are exhausted. Such was Milgaard's case.

He was convicted on January 31, 1970 and his appeal was argued on November 6, 1970. The Court of Appeal rendered its judgment on January 5, 1971. At the time Tallis argued before the Court of Appeal, Fisher had been apprehended and confessed to two of the four Saskatoon attacks and was being investigated for the other two. There is no evidence that any police or Crown officer connected Fisher to Miller's murder at this time.

Twenty-two years later, the Supreme Court of Canada in the Reference Case concluded that evidence of the Fisher rapes might reasonably have affected the verdict of the jury, entitling Milgaard to have his conviction set aside and a new trial ordered.⁷⁴ Presumably a similar result would have ensued in 1970, had Tallis known of the Fisher proceedings and raised them as fresh evidence before the Court of Appeal.

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[1980] 1 S.C.R. 759 at 775.

Reference Re Milgaard (Can.), [1992] 1 S.C.R. 866. See also Docid 058828.

Our criminal justice system is already properly equipped with a procedure to provide appellate review of the safety of convictions entered by a Court or jury at trial. There appears to be no dispute that appellate courts in each province are the proper forums to consider and rule upon the safety of convictions, whether heard by way of appeal in first instance or by a return to the Court as part of the system of conviction review. The critical questions are to determine the circumstances in which a convicted person can have another opportunity to have a conviction reviewed by the appellate court, and who is best suited to properly make that decision.

(d) Who Should be Responsible to Detect Wrongful Convictions?

In the current system, the convicted person bears the sole onus of investigating his own wrongful conviction to identify grounds to support an application for review. Placing the onus on an applicant to identify error and to provide all possible grounds to establish a likely miscarriage of justice gives rise to the following problems:

1. The convicted person is not always able, and certainly not the best equipped, to identify grounds to support a wrongful conviction. He is usually incarcerated, has few if any resources, and lacks the expertise needed to analyze and detect what may give rise to a remedy. He will usually rely upon the skills and advice of family, friends and advocates, who, although well intentioned, typically are very emotional and focused on innocence and compensation rather than upon the identification of specific grounds supporting a claim of wrongful conviction.
2. Few are fortunate to have the assistance of legal counsel. The identification of grounds to support a remedy is a difficult task even for legal counsel. A remedy should not be dependent upon legal counsel's skill and competence or the lack thereof.
3. The premise that a convicted person is in the best position to identify the grounds of a wrongful conviction is flawed. In many wrongful convictions, it is not what is known by the convicted person that will give rise to a remedy, but rather what is unknown. New information, not known at the time of trial, is needed to support the request for a remedy. Sitting through his own trial did not put Milgaard in a position to know that the Fisher information could have provided a basis to challenge his conviction. Nor did it help him to recognize procedural errors.
4. A convicted person does not have coercive power to gain access to documents such as police and crown files, nor does a convicted person have any right to compel witnesses to be interviewed.
5. Requiring the convicted person to investigate his case to detect his own wrongful conviction, can put the convicted person and his agents in contact with witnesses. This can be counter-productive. The valuable recollections of a witness may be influenced by positions taken by the convicted person, or by improperly conducted interviews.
6. By compelling the convicted person to investigate and detect his own case, it is inevitable that it will take far longer to detect and remedy a wrongful conviction. Joyce Milgaard spent eight years investigating and gathering information only to file an application which put forward two grounds that lacked substantial merit.
7. The role of federal Justice lawyers in reviewing and testing information put forward by an applicant invites an adversarial approach to the process. The process would be better served by a proactive and inquisitorial approach on the part of legal counsel for the Minister.

A convicted person should not bear the heavy burden of reviewing his or her conviction to identify grounds to challenge the conviction. An independent agency with expertise and sufficient powers is better suited to the important task of exposing wrongful convictions, and identifying and investigating grounds that support a return of the conviction to the Courts for review.

(e) Is the Federal Minister the Appropriate Gatekeeper to Determine Whether Convictions Should be Returned to the Court for Review?

There is a difficulty in considering the handling of the s. 690 applications by Justice Canada investigators. It is a constitutional one which places the operation and management of a federal entity outside the purview of a provincially appointed public inquiry. Williams and Pearson, however, generated a great deal of information which came to the attention of Saskatchewan Justice and the police and which potentially might have justified an earlier reopening of the case. To answer the question of whether it did, we necessarily had to look into the quality of the information they generated while refraining from any criticism of the manner in which they conducted their affairs.

Justice Canada, relying on constitutional prerogative, stoutly resists any effort to inquire into the reasons for actions or advice between federal officials in connection with s. 690 applications. At the same time, Minister Campbell justified her decision to refuse the first application, by referring to advice she received from outside counsel, retired Supreme Court Justice William McIntyre, not specifying what the advice was.

This, in my view, amounts to a serious lack of transparency in the s. 690 process, as it then was. How is an applicant to know he was treated fairly when the decision maker relies on unspecified reasons which he/she refuses to divulge? This secrecy in itself is a strong argument for having wrongful conviction inquiries dealt with by a commission, independent of government. Some might argue that solicitor/client privilege could be involved in any case, so the advice would remain secret. So it might, but it could also be waived (in contrast to constitutional prerogative), and should be if it is relied upon for the decision. After all, Justice Canada routinely asks for waivers from applicants.

Brown, of Saskatchewan Justice in commenting upon the s. 690 process, observed that Justice Canada has sole jurisdiction, but the subject matter of its investigation originates in the province, and if a remedy is granted involving the courts it will usually find its way back to the province. Another difficulty is that this applicant saw federal investigators as just more "prosecutors" whose mindset favored the conviction. I am satisfied that that was not the case, but the perception could be removed by the use of an independent agency to review wrongful convictions. Such an agency would also be free of the constitutional prerogatives which Justice Canada feels compelled to invoke to restrict the flow of information. That said, any agency might feel the need to control information in the course of its investigation, which would not sit well with some people, but at least reasons for its decision could be more transparent.

With respect, Justice Canada officials devoted much care to this case, but in general it may be said that the s. 690 process under which they worked had a certain built in lack of transparency on the investigative side.

In their application for judicial review in the course of this inquiry, Justice Canada argued that what Williams and other federal officials did was irrelevant to us. The argument was found not to be within the context of the judicial review, but the fact that it was even made indicates a climate of secrecy and parochialism in Justice Canada. This is ill suited to the investigation of claims of wrongful conviction, which necessarily involve aspects of both provincial and federal jurisdiction.

Without question, some of the information gathered by Justice Canada investigators in the s. 690 process was being passed along to Saskatchewan Justice, and therefore became relevant to the reopening of the investigation into the death of Gail Miller.

Another problem with the use of Justice Canada as an investigative agency in matters of wrongful conviction arises from the public failure to distinguish between Justice Canada and the Provincial Crown. According to Brown, Saskatchewan had an interest in the public's perception of how the s. 690 process was going. The media kept reporting a lack of response to its inquiries, which Justice Canada would not answer, and which Saskatchewan Justice felt constrained from answering.

As matters now stand, even if the Minister of Justice believed that, in order to reassure the public that the process had been fair, it was necessary to release an opinion she had sought, she could not. That, it seems to me, is an excellent reason to move the wrongful conviction business to another agency.

Milgaard's case became highly politicized as his supporters actively sought the attention of the media. Joyce Milgaard's confrontation with Justice Minister Kim Campbell in Winnipeg on May 14, 1990 was widely reported in the news media. Later, on September 6, 1991, she spoke to Prime Minister Brian Mulroney, in an encounter that was also widely publicized. She asked that David be transferred to a minimum security institution. Milgaard's request for a transfer to minimum security Rockwood Institution was approved at the end of October, 1991. During their September 6, 1991 meeting, the Prime Minister mentioned to Joyce Milgaard that he would be talking to the Justice Minister when he returned to Ottawa.

The Order-In-Council which referred the case to the Supreme Court of Canada on November 28, 1991 specifically mentioned widespread concern over whether there was a miscarriage of justice in the conviction of Milgaard, and that it was in the public interest for the matter to be inquired into.

Federal Justice Minister Campbell held a press conference on November 29, 1991, to announce that Milgaard's case had been referred to the Supreme Court of Canada. She stated that in order for her to grant a remedy under s. 690 of the *Criminal Code*, she had to be satisfied that there were reasonable grounds for believing that there was likely a miscarriage of justice. She emphasized that in referring the matter to the Supreme Court of Canada she had not come to any conclusion on whether a miscarriage of justice had occurred. She had not formed an opinion because she was faced with evidence, the value of which she was unable to ascertain, without the advice of the Supreme Court of Canada. She acknowledged that given growing public interest and concern, the case deserved a judicial and public examination. However, she denied that the case had ever been dealt with in a political way or that she had been influenced by media discussion.

While neither testified at the Inquiry, both former Minister of Justice Kim Campbell and former Prime Minister Brian Mulroney have, in their memoirs, discussed the handling of Milgaard's conviction review applications.

Campbell's book entitled "Time and Chance: The Political Memoirs of Canada's First Woman Prime Minister", was published in 1996.⁷⁵ In Chapter 10, "Doing the Right Thing", she discussed her handling of Milgaard's two s. 690 applications. On the subject of Prime Minister Brian Mulroney's meeting with Joyce Milgaard on September 6, 1991, Campbell complained:

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Kim Campbell, *Time and Chance: The Political Memoirs of Canada's First Woman Prime Minister* (Toronto: Doubleday Canada Limited, 1996).

...The PM had blindsided me on one of my most difficult issues. In the eyes of the media, the meeting signalled that the PM was involved. Norman Spector, the PM's chief of staff, called to assure me, somewhat sheepishly, that Mulroney had said nothing to Mrs. Milgaard about the section 690 application but had only agreed to look into her concerns about her son's living conditions in prison. Several months later, we began to understand the thinking behind this inappropriate intervention. In a chat with the B.C. caucus, Hugh Segal, who replaced Spector in early 1992, talked about the upcoming election and efforts to improve the PM's image. He then turned to the Joyce Milgaard incident in Winnipeg and said something like, "That's the kind of thing he should be doing more of. It was brilliant and portrayed a side of him that the people haven't seen before."

As I told the press, Brian Mulroney was much too good a lawyer to intervene improperly in this matter. He never breathed a word to me about Milgaard, nor did anyone in his office ever attempt to influence my handling of the case. However, Joyce Milgaard is convinced he did, and the media accepted this view. This sort of thing made it very difficult to establish that the only motivation guiding me and my officials was a desire to make the right decision.⁷⁶

In his book "Memoirs: 1939-1993", Brian Mulroney indicates that he did intervene in the matter of Milgaard's application for conviction review.⁷⁷ He writes of being privately furious with Campbell over the manner in which she brushed off Joyce Milgaard during their public encounter on May 14, 1990, and relates:

When I got back to Ottawa, I arranged for a fast review of David Milgaard's medical condition. He was soon transferred to a minimum-security institution. In an exchange of letters with Mrs. Milgaard, I told her, "I too, hope the matter will soon be resolved." I then had Hugh Segal summon Justice Minister Kim Campbell to my parliamentary office in Centre Block, where, because of the sensitivity of the matter, I met with her alone, although I debriefed Hugh Segal and Gilbert Lavoie immediately after.

"The matter had been reviewed by the department and I have conveyed our decision," she told me.

"Kim," I answered, "that is not acceptable to me. The law provides for a reference to the Supreme Court, and it is my intention to ensure that this case is in fact referred to the Supreme Court."

My tone was firm and my words unequivocal. She understood and changed her tack quickly.

"Prime Minister," she answered, "if this is the case, may I make the announcement myself?"⁷⁸

While the recollections of Campbell and Mulroney differ, on either account the Prime Minister intervened (successfully, on his word) in a statutory process which only nominally engaged the prerogative of mercy.

76 Ibid at 195.

77 Brian Mulroney, *Memoirs: 1939 - 1993* (Toronto: McClelland and Stewart, 2007).

78 Ibid at 901.

Inevitably, the federal Minister's decision was perceived as being political. The involvement of a federal politician in the review of individual cases of alleged wrongful conviction invites public advocacy in a media campaign, a war in which the truth is likely to be the first casualty. Although it can be said that the Milgaard case was unprecedented in the intensity of its media campaign, other wrongful conviction advocates have also relied upon public support to put pressure on the federal Minister.

The office of the federal Minister of Justice, identified, as it is by the public, with prosecutions, and being occupied by a political figure, does not lend itself well for the adjudication of issues which arise in the judicial system and are to be returned there. Parties unhappy with the Minister's decision to either grant a remedy for conviction relief or to refuse it are able to accuse someone of political favoritism, or of having succumbed to political pressure. Conviction review should be carried out by an agency independent of the government of the day.

5. The British Model (Criminal Cases Review Commission)

One of the reform options considered by the federal Minister prior to the enactment of ss. 696.1 to 696.6 was the creation of an independent tribunal to facilitate the investigation of alleged cases of wrongful conviction. The Minister's 1998 Consultation Paper pointed out the Criminal Cases Review Commission (CCRC), established in the United Kingdom in response to high profile cases of wrongful conviction, as an example of a system in which conviction review is handled by an independent body.⁷⁹

The Commission heard evidence from David Kyle, one of the founding members of the CCRC, on how the CCRC conducts investigations into cases of alleged wrongful convictions. Kyle served as a Commissioner with the CCRC from 1997 until his retirement in August, 2005. He provided the Commission with valuable insight into the reasons for the creation of the CCRC and its operation.

Kyle traced the history of the Commission for us. He explained that initial member appointments were not drawn from amongst those championing the correction of miscarriages of justice. He himself had been a prosecutor for 23 years. This was a help and put him at no disadvantage. One of the Commission's strengths is its wide profile – defence, prosecution and policing are represented.

Prior to the creation of the CCRC in 1997, the system for conviction review in the United Kingdom was very similar to the current Canadian system. Where appeals were exhausted, a convicted person could not challenge his conviction, unless the Home Secretary, an elected politician, referred his case back to the Court of Appeal. Applicants were responsible to investigate their own case to identify grounds to warrant a review by the Home Secretary, who had the discretionary power to refer a conviction back to the Court of Appeal if he saw fit.

Following widespread concern over several high profile cases of wrongful convictions in terrorist bombing cases, the Home Secretary, in 1991, established a Royal Commission on Criminal Justice which was given wide terms of reference to examine the effectiveness of the criminal justice system in England and Wales. The Runciman Report on the Royal Commission on Criminal Justice was presented to Parliament in 1993.⁸⁰ It recommended the establishment of an independent body to consider and investigate suspected miscarriages of justice, and the responsibility for conviction review was thereafter removed from the Home Secretary.

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For information on the CCRC see the CCRC website at <http://www.ccrc.gov.uk/>.
The Royal Commission on Criminal Justice (London: HMSO, 1993).

The report leading to the establishment of the CCRC said:

The last part of our terms of reference requires us to consider whether changes are needed in the arrangements for considering and investigating allegations of miscarriages of justice when appeal rights have been exhausted. Almost all of those who gave us evidence argued that the arrangements should be changed, with the responsibility for reopening cases being removed from the Home Secretary and transferred to a body independent of the Government. We agree that there is a strong case for change. We therefore argue in this chapter for the establishment of a new independent body to consider allegations of miscarriages of justice, to arrange for their investigation where appropriate, where that investigation reveals matters that ought to be considered further by the courts, to refer the cases concerned to the Court of Appeal. We discuss in some detail the role of such a body, its relationship to the courts and to the Government, its composition and how it should be held accountable, the powers it may need to investigate cases, and how those cases should be selected.⁸¹

The motivating factors behind the creation of the CCRC were described by Kyle in "Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission":

The Royal Commission voiced two principal concerns about the Home Secretary's role in relation to miscarriages of justice. **First, examination of how the role was exercised revealed a restrictive and essentially reactive approach by the Home Office characterized by the absence of investigative initiative.** Secondly, this role assigned to the Home Secretary was incompatible with the constitutional separation of powers between the courts and the executive; indeed, trying to keep them separate had contributed to the reluctance of the Home Office to enquire deeply enough into cases it was asked to consider. Put another way, it was undesirable for the Home Secretary to be directly responsible for reviewing suspected miscarriages of justice as well as being responsible for law and order and the police.⁸²

It was recognized that the state should bear the responsibility to facilitate the investigation of wrongful convictions, and that it was neither appropriate nor expedient to leave this up to the convicted person. One of the mandates of the CCRC is to investigate an alleged wrongful conviction based solely upon an application by a convicted person. The convicted person no longer bears the heavy burden of reviewing his or her conviction to identify grounds to challenge the conviction. The CCRC consists of people with significant expertise and appropriate powers to review convictions and identify those grounds that may give rise to a remedy.

The CCRC is not a servant or agent of the Crown, but rather an independent commission. Commissioners are appointed on the recommendation of the Prime Minister, and there are to be not fewer than 11 members. At least 1/3 of the Commissioners must be legally qualified and at least 2/3 must have experience or knowledge of some aspect of the criminal justice system. One of the strengths of the Commission is the diverse backgrounds of the various Commission members, including non-legal perspectives. In addition to the Commission members, the CCRC employs a staff of case managers and administrators. The Commissioners determine whether to refer cases to the appeal courts. Much of the

81 Ibid at 180. See also docid 340178.

82 David Kyle, "Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission" (2004) 52 Drake L. Rev 657 at 661.

investigative work is conducted by case review managers. Some case review managers are lawyers, but people from a wide variety of backgrounds fill this role.

Parliament also concluded that a member of government should not act as gatekeeper in deciding whether a case should be returned to the Court of Appeal. This function was transferred from the Home Secretary to the CCRC. By combining the investigation and the gatekeeper functions, the efficiency of the conviction process improved. The CCRC is knowledgeable about the grounds that have a chance of succeeding before the Court of Appeal, and can tailor its investigative efforts to identify meritorious grounds.

The CCRC has been in operation for 10 years and represents a significant improvement in the manner in which wrongful convictions are detected, investigated and remedied in the United Kingdom. The following is a more detailed review of its process.

(a) The Application and Investigation

Anyone convicted of a criminal offence in England, Wales or Northern Ireland can apply to the CCRC. Generally speaking, the CCRC will accept an application if (1) there has already been an appeal (or leave to appeal has been refused) and there is some new factor which the Courts have not considered before, or (2) there are exceptional circumstances.

The huge bulk of applications come from applicants directly, with no involvement from legal counsel. The CCRC has a comprehensive website and undertakes initiatives to ensure that it reaches its audience of potential applicants.⁸³ The application form on the website is written in plain language and is designed to be completed, with relative ease, by an applicant. The application form states:

This form is for anyone who wants us to review a conviction or sentence that they think is wrong. We have written the form as though the person who was convicted is going to fill it in, but anyone can do this for them.

The applicant is asked to answer all of the questions if he or she possibly can, and is advised that if assistance is required, the CCRC should be contacted. The applicant is asked to tell the CCRC what he or she thinks went wrong and what is new about the case. The applicant is also asked to send the CCRC papers (if able to), and is advised that if the applicant does not have them the CCRC can obtain them. The form includes an authorization to be signed by the applicant allowing the CCRC to contact the applicant's solicitor for the purpose of collecting information and documents about the case.

The applicant is not required to investigate his own case and in fact is encouraged not to, lest it impede the work of the CCRC. Most applications appear in the form of a letter from the complainant. The CCRC listens carefully, but also looks at the case as a whole. It is more proactive than reactive. This cannot be said for Justice Canada who sees its role as the careful examiner of the best case the applicant can put forward.

The CCRC is a non-departmental public body, internally governed, and as such can be perceived as independent. The Home Office has a legitimate interest in the resources of the CCRC but not in its casework. As to informing prisoners of their rights, Kyle acknowledged that potential applicants are typically poor, in prison, and suspicious. But he said that the CCRC's literature is in every prison and they

have made a conscientious effort to inform prisoners. The CCRC encourages applicants to send what they have, but regards it as its own responsibility to get what it needs.

They have about 40 written policies, operational and legal. Their objective is consistency. Prodding from lawyers or Members of Parliament is not needed.

It is the policies and procedures which are transparent to the public, not the progress of individual cases.

Once an application is received, the CCRC decides how extensive the investigation should be, and what avenues should be pursued. The CCRC sees it as its responsibility to obtain the information necessary to conduct a proper review of the case. This usually includes the police, prosecution and defence files.

The CCRC takes a proactive role in the investigation of applications as Kyle described at the Inquiry:

- Q. Is there an expectation or a requirement that an applicant himself or herself investigate and come to your Commission with the grounds for the application?
- A. There is no requirement or expectation that they will do so. Generally speaking – the vast majority of applications received by the Commission appear in the form of a letter written by the applicant possibly from prison in which the applicant gives their understanding of why they think that they are the victim of a miscarriage of justice and quite often, as you might imagine, the reasons why they think things have gone wrong may actually bear no relationship at all to the actual reason why things have gone wrong, and if I tell you, for example, that one of the commonest expressions of grief in applicants who apply to the Commission is that their lawyers didn't act for them properly, that again, as will come as no surprise to hear, is very rarely the basis for referring a case back for an appeal, **so we certainly don't expect them to have done any investigative work of their own.**

Sometimes if they are represented for the purpose of making an application they may have done some investigative work, but our experience leads us to think that if the case is to be investigated by the Commission, **we would actually much prefer it if we could identify the areas of investigation which we wish to undertake and how they should be structured rather than to have something which has been precooked sent to us.**

- Q. And so I take it from that that an applicant who may put forward a ground or two in his or her letter to the Commission, that that doesn't limit the Commission in the grounds that they investigate; in fact, it may be that the Commission looks at what it thinks are more appropriate. Is that fair?
- A. That's absolutely fair. I mean, the Commission is very interested to consider very carefully what applicants have to say because they are quite likely to be in a better position than anybody else to know where things have gone wrong, but what the Commission does is look, having looked carefully at what the applicant has to say about the predicament he or she finds themselves in, that then to look carefully at the case as a whole and, as I say, this is why this early investigation into how things have

got to where they are is so important, to be able to identify where there are issues which could make a difference to the safety of the conviction.

Q. There are some writers that have described your Commission as being more proactive than reactive as far as the investigation, and would you agree with that description?

A. Yes.⁸⁴

The CCRC has the expertise to investigate the cases of those who feel they have been wrongly convicted or unfairly sentenced. In fact, it is now the expectation, on the part of applicants and their legal counsel, that the CCRC will undertake the investigation of alleged miscarriages of justice. Kyle stated that the CCRC much prefers to do the investigation on its own as it, and not the applicant, has the expertise. He testified as follows:

Q. And can you tell us, what would you see as being the advantages of the Commission investigating possible wrongful conviction, miscarriages of justice, or reviewing information, as opposed to the applicant and/or the applicant's – people assisting the applicant?

A. Well I think the big, the greatest risk with leaving the investigation to the applicant or their representatives – and we've already identified one risk, which was articulated in the Royal Commission report – was that that encouraged the person who was going to make the decision whether to refer the case or not somewhat inactive and put in too – laying too much store by what the applicant was able to come up with by way of persuasion to refer the case back.

But when one looks, say, assuming the investigation is to be done, **the strength, I think, of the Commission doing it rather than leaving it to the applicant is that the Commission, all things being equal, is likely to have a far better understanding of what it is about the case that needs investigating and to what end that investigation is best directed.**

So if we take, for example, a situation where you have a case which was dealt with, in terms of trial, many years ago, and the applicant and his legal representatives are absolutely convinced that witnesses at the trial many years ago either didn't tell the truth or could have said something different and they convince themselves that this is the case, so they run back to the witnesses and ask them to give them another statement telling them what happened 25 years ago, now I think the Commission's view in such circumstances would be that it's extremely unlikely that asking a witness to give a version of events from memory 25 years ago, even if it differed from the evidence which was given at trial, is actually likely to be given a great deal of weight either by the Commission or, indeed, by the Court of Appeal. Because all you're doing is playing off the same witness, playing off the same witness' recollection over a long period of time, but an applicant or representative may be very firmly of the view that that is the best way of doing the investigation whereas in fact the actual, the more effective investigation, might be on very different lines.

And I think, from the point of view of the investigation being an effective one and producing material which has a positive outcome so far as any decision to refer the case is concerned, it is better that if you have a body, as we do with the CCRC, who has both this investigatory and decisive role, that the advantages are very much in favour of the Commission identifying lines of inquiry and how they should be pursued and the objectives which those investigations are – seek to achieve.⁸⁵

The CCRC has wide ranging investigative powers and can obtain and preserve documentation held by any public body. It can also appoint an investigating officer from another public body to carry out inquiries on its behalf. Kyle indicated that while the CCRC has the power to compel the production of documents, it does not have any power to compel witness interviews. The CCRC has not, on the whole, encountered problems in speaking to witnesses but Kyle advised that the CCRC would like to see legislative change in this area.

In some cases, the CCRC will interview the applicant but this is not done routinely. The CCRC does not require the applicant to assert that they did not commit the crime. As discussed in greater detail below, Kyle explained that the circumstances in which a conviction might be unsafe are far wider than the narrow question of whether the applicant is factually innocent.

Kyle said that the CCRC routinely informs applicants of what lines of inquiry are being taken, but generally they do not disclose evidence as they find it. Applicants should be made to understand that they are not partners in the investigation. They are given a chance to make submissions and the commission gives reasons for both referrals and refusals. Internal work of the members such as advice, memos and discussions are not shared with the applicant. The information to be disclosed is that which supports the decision. An applicant may re-apply.

(b) Test for Referral

In deciding whether to refer a case back to the Court of Appeal, the CCRC employs the "real possibility" test set out in section 13 of the *Criminal Appeal Act 1995*.⁸⁶ If the Commission is satisfied that there is a "real possibility" that the conviction will be quashed by the Court of Appeal, it shall refer the case back to the Court of Appeal. A decision to refer a case to the Court of Appeal can only be made by a committee of at least three commissioners.

The Commission serves as a gatekeeper to the Court of Appeal to whom it refers cases. The Commission does not concern itself with guilt or innocence, just whether there is a real possibility that the conviction is unsafe. The court decides whether the conviction is safe and, if it is not, they must quash it.

The CCRC's concern is whether a person is rightly or wrongfully convicted, considered on an objective, evidential basis. Wrongful conviction can mean that someone has been convicted of an offence which he did not commit – he is innocent in the absolute sense – or it can mean that a person was convicted in a flawed trial or because significant, relevant, new evidence has come to light which might have affected the verdict of a jury. The real possibility test has to be applied in finding new evidence or a new factor which could have caused the trier of fact to act differently.

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T40148-T40151.

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Criminal Appeal Act 1995 (U.K.), 1995, c.35.

The Commission does not reassess matters which a jury has considered. Kyle said that they try to identify lines of inquiry likely to result in a remedy. They look for time and resource effective investigative paths through a rigorous process of investigative planning.

Where a decision to refer is made, a statement of reasons is issued and the case is sent to the Court of Appeal. The statement of reasons is a comprehensive document, setting out the case at trial, the issues on appeal and the investigative steps taken. It also contains the CCRC's analysis of the facts and issues, and the impact of new information on the safety of the conviction. A copy of the reasons for making the reference is sent to every person likely to be a party to the appeal proceedings. Kyle explained the grounds of appeal are now limited to those identified by the CCRC in its statement of reasons, unless the applicant obtains leave to extend the grounds. If the case is referred to the Court of Appeal, the involvement of the CCRC is at an end. The applicant is required to prepare and argue the appeal. The Court of Appeal will allow an appeal against conviction if they think that the conviction is unsafe.

Kyle discussed the test for making a reference to be that "...there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made".⁸⁷ The reference must be made on argument or evidence not raised in the proceedings which led to it – for example, either at trial or on appeal. And the weight of the new evidence or new argument must be such as to provide the basis for a serious challenge to the safety of the conviction. Examples are new forensic evidence and evidence from recently discovered witnesses. An uncorroborated recanting witness will not likely provide reason enough for a referral. The Court of Appeal is cynical about them. There are two types; one recants his trial evidence and the second comes forward to take all the blame when two people have been convicted. All sorts of pressures cause witnesses to recant, some having nothing to do with the truth. Elapsed time is an important consideration. "What caused you, after all this time, to come forward?" Only a handful of cases have been sent to the Court of Appeal based on recantations but, that said, a recantation can cause inquiry into other evidence at trial.

Where a decision is made not to refer a case to an appeal court, the CCRC must also provide a statement of reasons for its decision to the applicant. As a matter of fairness, applicants are given an opportunity to make further representations. They are given 20 working days to respond to a provisional view not to refer their case. If no response is received, a statement of reasons is then issued and the case is closed. If a response is received, any issues raised by the applicant are considered and the case is passed to a Commissioner to make a decision. If there are grounds to refer the case, a statement of reasons is issued and the case is sent to the appeal courts. If there are no grounds to refer the case, a statement of reasons is issued and the case is closed.

In Kyle's words:

....If we make a decision to refer a case to the Court of Appeal, we make that decision, and articulate the reasons for doing it. If we are thinking that this is a case – and this is so in the majority of the cases that the Commission deals with – that it's not a case where there is a basis for referring the case to the Court of Appeal, then we are required to indicate that as a provisional conclusion, and invite representatives – invite further representations from the applicant which we can then take into account before making the final decision not to refer a case. And there is the further requirement that, at the point of notifying the applicant of a provisional conclusion that there are no grounds for referral,

we are required to disclose all the evidence and information that we have relied on for the purpose of reaching that provisional conclusion." (T40102-40103)

...

"Q. And we'll see some statistics later, but I think about 70 percent of the cases you send to the Court of Appeal result in a remedy; is that roughly –

A. Between 60 and 70, yes.

Q. And from your perspective, is that the right number as far as the real possibility?

A. Well, the real – there is no definition of real possibility and necessarily there has to be a gap between the real possibility evaluation and the outcome in the Court of Appeal itself, and although there may be some who think that the gap is not wide enough, the view which the Commission has traditionally taken is that to find the Court of Appeal, if you like, agreeing with our evaluation in two-thirds of the cases and disagreeing with one-third suggests that we are applying a responsible approach to our evaluation of what is a real possibility.

Q. And is it correct to say that your Commission does not decide the guilt or innocence of an applicant?

A. No, it doesn't.

Q. And does not directly provide a remedy setting aside the conviction or anything of that nature?

A. No.

Q. And that it's up to the court to decide, whether or not the verdict is safe?

A. Yes.

Q. And your role is simply to decide whether or not the applicant should have another chance to go there?

A. Yes.⁸⁸

Kyle spoke of the meaning and practical application of the "real possibility" test used. He described it as setting a relatively low threshold. In his article entitled "Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission", he wrote that: "Real possibility is not defined by the statute, and the Commission has consistently taken the view that it should not be given a restrictive interpretation, a view with which the court is on the face of it content."⁸⁹ The courts have described "real possibility" as "more certain than an outside chance or a bare possibility, but which might be less than a probability, or a likelihood, or a racing certainty."⁹⁰

88 T40102-T40103; and T40039-T40040.

89 Supra note 82 at 666.

90 Ibid.

The CCRC does not concern itself with questions of guilt or innocence in the absolute sense but rather the safety of the conviction.

- Q. And again, in your view, then, does a person have to demonstrate or establish factual innocence or innocence in the absolute sense to establish that he has been wrongfully convicted?
- A. Not from the point of view of the application to the Commission's test in deciding whether there is a real possibility that the Court of Appeal might find that conviction to be unsafe. I mean, I would make the general observation that whilst, if you do have a situation and you may not ever know whether you do or don't have a situation, but if you do have a situation where someone is innocent in the absolute sense, it would, of course, be very desirable and very gratifying if that could actually be established, **but the reality is that that rarely can be established, it's very rare indeed when carrying out investigations into a conviction which is alleged to be a wrongful one to find wholly-exonerating evidence.** In the great majority of instances where the Commission has referred cases to the Court of Appeal it has been on the basis of that other category of wrongful conviction which I've just described.
- Q. And so if we had a situation where a person was convicted and then 10 years later it became apparent that there was evidence that had it been presented at trial may have affected the verdict of the jury and the Court of Appeal then quashes that conviction, again, in your view, would that then be a wrongful conviction of that person?
- A. Yes.
- Q. Regardless of whether that person can or cannot establish his factual innocence?
- A. Yes.
- Q. Can you tell us, in the work of the CCRC, is factual innocence something that is any part or a significant part of what you investigate?
- A. Umm, no, and it's – it certainly isn't any, in any way a motivating factor behind how we go about the investigation. It may be, at the end of the investigation, we do acquire evidence which we can then say "this not only shows the conviction to be unsafe but it also appears to demonstrate that the defendant is factually innocent", but that, if you like, is a bonus, if it happened, but it isn't essential to the meeting of the test or referral to the Court of Appeal.
- Q. And is it fair to say that, at least how you've described it, where the English Court of Appeal quashes a conviction that you've referred to them on the basis that the conviction is not safe because new information came to light that might have affected the verdict, that that would be a wrongful conviction, and that the Court would not look at the issue of factual innocence?

- A. No, because the Court would only be concerned with the question whether the conviction was safe or not, **and safety doesn't depend on the establishment of factual innocence.**
- Q. Well how –
- A. Well unsafely, I should say, doesn't depend on the issue of factual innocence.
- Q. And then, generally speaking then, are – people who have had their convictions quashed after being referred to your Commission, I think you are telling us, would be considered wrongfully convicted and in some instances entitled to compensation on the basis, solely, that their conviction was quashed; is that correct?
- A. Yes. I hesitate for – I'm trying to get the full import of that question. The – a person who is convicted and then successful on appeal may bring themselves into the frame for compensation, but it by no means follows that simply because someone's conviction is quashed on appeal, that they are necessarily entitled to compensation.
- Q. Even though I think you are saying they would be wrongfully convicted, the question of compensation depends on other factors, is that –
- A. Well, certainly. I mean for the – I mean what I am saying is that the question of whether someone should be compensated for having been convicted, and subsequently that conviction is quashed, is a different question to whether that person has been safely or unsafely convicted.
- Q. And I take it the compensation part is not something you people either deal with directly or consider in any way in any of your work?
- A. No, we don't. There was a suggestion in the early times, early life of the Commission, that the Commission should actually take over responsibility for considering compensation claims from the Home Office, and the Commission resolutely resisted that suggestion.
- Q. And I take it, then, that, once the conviction of a person is quashed, that person reverts to the legal presumption of innocence?
- A. Absolutely.
- Q. And is innocent in that sense?
- A. Yes.⁹¹

(c) Review of CCRC Operations

Kyle testified that the number of applications received by the CCRC has remained fairly steady at between 70 to 80 per month. He explained that approximately 1/3 of applications received do not qualify (generally because the appeal process has not been exhausted). Of those applications that do qualify, approximately 2/3 can be dealt with fairly quickly in a streamlined process with the remaining 1/3 constituting more

complex and time consuming cases. Overall, the CCRC's rate of referral to the appeal courts is approximately 4 percent. Of cases that are referred, the success rate in the appeal courts is approximately 70 percent. The CCRC's 2006/2007 Annual Report states the following:

At 31 March 2007 the Commission had referred 356 (4 percent) out of 8,951 cases completed. The appeal courts, including the House of Lords, had determined a total of 313 referrals, quashing 187 convictions (68 percent of those referred) and upholding 88 (32 percent). In the same period, 33 sentences (87 percent of those referred) were varied and 5 (13 percent) upheld. The remaining 43 cases were still to be heard at 31 March 2007. The combined rate of convictions quashed and sentences varied was 70 percent.⁹²

The majority of cases where a remedy is granted do not involve misconduct or deliberate wrongdoing, said Kyle. Rather, the cases resulting in referral involve either the discovery of relevant new evidence, or, some flaw in procedure due to human error. In his article "Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission", he wrote:

...From the Commission's perspective, cases that result in referral tend to fall into two broad categories. The first is cases in which relevant new evidence appears, occasionally if rarely being wholly exculpatory, but more often being of a nature that, had it been heard by the jury, might reasonably have caused them to come to a different verdict...The second category, more closely aligned to the types of issues raised by applicants themselves, involves some flaw in the investigation, prosecution, or trial process not brought about by malice but rather, in plain terms, because someone has not done his or her job properly – and this may well be something to which the defence lawyers have contributed. In today's complex criminal justice system, opportunities for falling down on the requirements of a fair trial are legion, but it is not the simple fact of failure that counts, but its significance to the safety of the conviction, taking account of the whole circumstances of the case.⁹³

The time it takes the CCRC to make a decision on whether a case should be referred to an appeal court will depend on its complexity. On average, the CCRC aims to complete its investigation and make a decision on referral within six months.

The CCRC's annual budget is approximately £7 million. The population of the United Kingdom, excluding Scotland, is approximately 65 million, which is roughly double the Canadian population.

When the CCRC came into existence there were some who predicted that the floodgates would be opened, but Kyle indicated that the number of applications received by the CCRC on a yearly basis has remained fairly steady. Applicants can apply more than once and some do. This is likely a hallmark of the accessibility of the system. Many applicants apply on their own but there is also the availability of legal aid. While only a small fraction of applications are referred, Kyle explained that in his view, investigation of an unsuccessful complaint of wrongful conviction is as valuable to maintaining confidence in the judicial system as exposing a wrongful conviction.

92 Supra note 79.

93 Supra note 82 at 672.

6. Comparison of Canadian and British Systems

The key to any successful system of reviewing claims of wrongful conviction is attitudinal. Wrongful convictions must be seen as inevitable rather than exceptional, and there must be openness in admitting them and resolve in correcting mistakes.

David Kyle wrote:

However, because it is idle to pretend that things will not go wrong in even the best regulated criminal justice system, there is a question of critical cultural importance. Will whatever mechanism that is adopted to address the cries of those who claim to have been wrongly convicted have at its heart the will to own up to mistakes and learn lessons, or will it strive to preserve the status quo?⁹⁴

In Canada, while it is acknowledged that wrongful convictions regrettably can and sometimes do occur, they are still regarded as exceptional. And so they are, in numbers at least. But they are disproportionately serious in nature, striking at the heart of the legal presumption of innocence upon which the fairness of our criminal trial process depends.

In his article entitled "Facing up to Miscarriages of Justice", Graham Zellick, Chairman of the CCRC, said:

No criminal justice system, however good it is or is thought to be, will be immune from error. That, of course, is acknowledged in all developed systems by the process of appeal, but not all errors can be detected at that stage. Evidence may emerge only later, there may be developments in law and practice, there may be later evidence of impropriety, error or irregularity. Thus, in every system, however good and whatever its trial and appellate arrangements, there will be wrongful convictions or miscarriages of justice.

Most developed systems regard the reopening of convictions once the normal appellate processes have been exhausted as fairly rare and extraordinary. A power is usually vested in some person or body with appropriate authority, but it is typically immensely difficult to disturb a conviction or even persuade the relevant authority to reopen the matter for further investigation. These arrangements cannot be said to provide an adequate system for dealing with the inevitability of wrongful convictions. That is why it is essential to have standing machinery of some kind to deal with these issues. **Finality in civil proceedings has everything to commend it: finality in criminal proceedings, where liberty and reputation are at stake, is a singular evil.**

It must, however, be emphasized that post-conviction review machinery is not a substitute for getting the criminal process right, for striking the correct balance between the prosecution and defence, and for having the appropriate procedural rules and safeguards. Post-appeal review presupposes a robust, effective and fair criminal justice system. Otherwise, the burden placed on it will be unsupportable.

The ability and willingness of the criminal justice system in any country to confront miscarriages of justice and wrongful convictions is a fundamental test of its humanity, decency and fairness. Justice demands no less.⁹⁵

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Supra note 82 at 660.

95

Graham Zellick, "Facing Up to Miscarriages of Justice" (2006) 31 Man. L.J. 239 at 239-240.

(a) Proactive v. Reactive

The Canadian conviction review system, notwithstanding legislative changes made in 2002, remains essentially a reactive process. Not so the English CCRC, as Kyle explained:

...and the key, it seems to me, whoever this power is exercised by, it doesn't matter whether it's – for these purposes, practical purposes it doesn't matter very much whether it's done by a government minister or by an independent person, **the key to exposing wrongful convictions is having the will and the resources to go out and investigate to see whether there is anything wrong and not simply sit back and say to the applicant, well, if you can show me something new I may react to it, but if you can't, I'm sorry, there's nothing I can do.**⁹⁶

An individual in prison can apply on his or her own and an investigation will be triggered. The process starts with the CCRC gathering relevant records from the court, defence and prosecution, and the police. There is recognition that convicts face great difficulty in getting the evidence, and in developing the argument needed to overturn the wrongful conviction.

Applicants, and even legal counsel, do not have the expertise required to identify the issues which could make a difference to the safety of the conviction.

The conviction review system in Canada is not so accessible. Application requirements are onerous and beyond the ability of most convicted persons. The onus of identifying all the grounds of the alleged miscarriage of justice is heavy.

These difficulties are reflected in the small number of applications received by the federal Minister. His Annual Report for 2007 indicates that in the year ended March 31, 2007, a total of 18 application requests were made.⁹⁷ Of these, only four were completed. The remaining 14 were partially completed, meaning that the applicant has submitted some but not all of the forms, information and supporting documents required by the Regulations. Only completed applications are considered by the Minister. In his report to Commissioner LeSage in the Driskell Inquiry, Professor Roach noted that the statistical information now reported by the federal Minister in the annual reports demonstrates "the comparative rarity of applications and the greater rarity of successful applications under s. 696.1."⁹⁸

Access to the review process is more restrictive here than in England, where the emphasis seems to be on an openness to listen to everyone's complaint and accord it appropriate investigative resources.

(b) Independent v. Political

Prior to creation of the CCRC, conviction reviews were handled by the Home Secretary, the Member of Cabinet responsible for criminal justice. In 1993, the Runciman Report on the Royal Commission on Criminal Justice recommended the establishment of a new body independent of both the government and the courts, to be responsible for dealing with allegations of miscarriages of justice.⁹⁹ This recommendation was based on the concern that the role assigned to the Home Secretary was incompatible with the constitutional separation of powers, as between the courts and the Executive.

96	T40080.
97	Supra note 54.
98	Supra note 56 at 11.
99	Supra note 80.

The argument is not quite as straightforward in Canada, a federal state, where jurisdiction over criminal law matters is shared between Canada and the provinces. The federal Minister, in our case, found herself removed from the process which convicted Milgaard. Still, the appearance of interest remains. Brown testified that the public makes no distinction between Saskatchewan Justice, and Justice Canada. For many it seems that a prosecutor is investigating a prosecutor.

The CCRC is an executive non-departmental public body. It receives funding from the Secretary of State for the Home Department. While the CCRC acknowledges a duty to account fully for funds received from government, it has the independence to decide individual cases without interference or pressure. The CCRC states in its Annual Report 2006/2007 that "our ability to do justice in all cases means that we must also have the freedom to decide how we go about our work, what categories of cases we investigate, and how decisions are reached. These responsibilities are cast on us by Parliament, they are critical to the decisions reached in individual cases, they underpin the confidence our stakeholders have in us, and they must be exercised fearlessly."¹⁰⁰

In his article noted above, Zellick argues that the most appropriate model for conviction review is a free-standing statutory body. He argues that where responsibility for conviction review is located within central government, as part of the responsibility of a minister, the system will never inspire the degree of confidence that is necessary:

There is also the issue of principle, namely, that it is no part of a ministerial role to be involved in the administration of justice as it relates to individual cases. It is true that there is a long tradition of such involvement in the British system deriving from the Crown's role in exercising the royal prerogative of mercy. But the historical explanation should not be taken to legitimise a current ministerial role, which also implies a degree of parliamentary scrutiny. That is to risk infusing an individual criminal conviction with a political dimension, which is entirely undesirable...¹⁰¹

At the Inquiry, Kyle testified that political pressure is not brought to bear on the CCRC in its handling of individual cases. He commented that were a case to be raised in Parliament, the responsible Minister, presumably the Home Secretary or the Attorney General, would simply indicate that the government had no standing in the way in which the CCRC made its decisions in individual cases.

The Prime Minister, in his memoirs, has said that he intervened in Milgaard's conviction review applications being conducted by his Minister of Justice. Notwithstanding legislative amendments made in 2002, applications for conviction review are still decided by the federal Minister of Justice. So long as the responsibility for conviction review remains with the federal Minister of Justice, an elected politician, there will be the potential for political pressure to play a role in the decision making process, or, at the very least, for the perception to exist that the decision was influenced by political pressure. The conviction review system must not only be truly independent, it must be seen to be independent.

(c) Inquisitorial v. Adversarial

The CCRC brings a non-adversarial and inquisitorial approach to the process of conviction review, and that is its strength, in Kyle's view. There is now an expectation on the part of applicants and their counsel that the Commission will conduct an investigation with the result that applicants defer to the

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Supra note 79.

Supra note 95 at 240.

CCRC's expertise, in preference to investigating themselves or launching media campaigns. A feature of independence is the ability to inquire without regard to vested interests.

The adversarial nature of the conviction review process in Milgaard's case was largely of the applicant's own making, but the system itself is partly at fault. In the "Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell", Commissioner LeSage endorsed the recommendation made by Commissioner Cory in the "Report of the Inquiry Regarding Thomas Sophonow" that there should be a completely independent entity established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged.¹⁰² In making this recommendation, Commissioner LeSage noted his concern about the adversarial nature of the current conviction review process. He wrote the following:

I concur in this recommendation, especially in light of the submissions of the WPS, and the evidence of Chief Ewatski, recognizing the difficulties encountered with the post-conviction review process. In particular, I am concerned about the adversarial nature of the present process. Driskell could not launch an application until he had sufficient disclosure to satisfy the Department of Justice standard for launching a section 696.2 review. However, the WPS would not make disclosure for purposes of a section 696.2 review until Driskell's application was made. This is a classic "catch 22" situation. If there was an independent inquisitorial body, as in the U.K., it could, after having been satisfied that a threshold, not necessarily a high threshold, has been met, commence the section 696.2 process of its own initiative. In this way, information that is unavailable to the applicant because of their inability to compel disclosure, would be available to the independent agency to allow them to make a better determination of whether a miscarriage of justice occurred.¹⁰³

(d) Low Threshold v. High Threshold

In the U.K., the CCRC investigates applications on behalf of those alleging they were wrongly convicted or unfairly sentenced, and then decides whether a matter should be referred to the Court of Appeal. In determining whether a referral should be made, the CCRC employs the real possibility test set out in section 13 of the *Criminal Appeal Act 1995*.¹⁰⁴ Section 13 indicates that a reference of a conviction shall not be made unless the CCRC considers that there is a real possibility that the conviction would not be upheld by an appeal court.

The real possibility test has been described as setting a relatively low threshold for an applicant, consistent with the CCRC's view of itself as a gateway into the Court of Appeal. At the Inquiry, Kyle commented that "we see the real possibility test as being a relatively low threshold, it's not a hugely difficult hurdle for an applicant to overcome."¹⁰⁵ Kyle also confirmed that it is up to the court to decide whether or not the verdict is safe. The CCRC's role is simply to decide whether or not an applicant should have another chance to go there.

Pursuant to s. 696.3(3) of the *Criminal Code*, the Minister of Justice may grant a remedy on an application for ministerial review if he is satisfied that there is a reasonable basis to conclude that a miscarriage of

102 Supra note 69,
103 Ibid at 121.
104 Supra note 86.
105 T40213.

justice likely occurred. This test is similar to that used by the Court of Appeal when hearing a case that has been referred to it by the Minister of Justice.

In *Truscott*, the Ontario Court of Appeal explained:

The two kinds of potential fresh evidence described above raise different issues for an appellate court to consider. However, there are two important characteristics that the two kinds of evidence share. First, both attack the reliability of the verdict. **To succeed on appeal, whichever kind of fresh evidence is offered, the appellant must ultimately convince the appellate court that the fresh evidence sufficiently undermines the reliability of the verdict so as to warrant the conclusion that maintaining the verdict would amount to a miscarriage of justice.** Second, both kinds of evidence lead to the same result: the quashing of the conviction. The second stage of the fresh evidence analysis, that is, the determination of the appropriate remedy, must follow regardless of which category of fresh evidence leads to the quashing of the conviction. At the remedial stage, the court can look at all of the material tendered by the parties.¹⁰⁶

The test used by the Minister and by the Court are necessarily similar because s. 696.3(3) gives the Minister the power not only to refer to the Court of Appeal but also to order a new trial.

It is objected that the gatekeeper Minister should use a lower test than that employed by the Court of Appeal. That objection, in my view, is answered by the fact that under s. 696.3(3) the Minister is more than a gatekeeper. He can order a new trial himself, a fact which actually simplifies matters for an applicant with a strong case. However, were a review agency to be established to act as a gatekeeper as does the CCRC, it would not have the power to order a new trial and could therefore reasonably employ a less onerous test – one of reasonable possibility.

(e) Delay

Processing the first Milgaard s. 690 application was delayed by incompleteness and incremental advancement of grounds. It is not a good example of how quickly claims could be processed at the time. That said, the CCRC is quicker than the Canadian system, probably because the applicant there faces fewer documentary requirements before investigation can begin.

(f) Cost

The Commission is not in a position to provide a cost comparison of the two models. However, without early and efficient intervention by an independent, proactive agency, the costs associated with resolving claims of wrongful convictions will remain unacceptably high.

(g) Public Confidence

Public confidence in the administration of criminal justice was shaken in the Milgaard case by a strident media campaign which found an easy target in the federal Minister of Justice, depicted as lacking in independence and accountability. An agency such as the CCRC, freed of constitutional constraints and political connection, could act with more transparency and effectiveness.

7. Recommendations

It is my recommendation that the investigation of claims of wrongful conviction should be done by a review agency, independent of government, established along the model of the English Criminal Cases Review Commission. Applications would no longer be made to the federal Minister of Justice under s. 696.1 of the *Criminal Code*. The agency would refer worthy cases to a Court of Appeal where the successful applicant would argue his case as though it were an appeal from conviction at trial.

I am not the first Commissioner to conclude that Canada's conviction review process is in need of change, nor am I the first Commissioner to recommend the establishment of an independent review body. Rather, I add my voice to those who, in four previous provincial commissions of inquiry, have recommended the creation, or study into the advisability of, an independent entity to review and investigate alleged wrongful convictions.

In the "Report of the Royal Commission on the Donald Marshall Jr. Prosecution", Commissioners Hickman, Poitras and Evans recommended that:

- 1) the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorneys General with a view to constituting an independent review mechanism – an individual or a body – to facilitate the reinvestigation of alleged cases of wrongful conviction; and
- 2) the review body have investigative power so it may have complete and full access to any and all documents and material required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.¹⁰⁷

A similar recommendation was made by Commissioner Kaufman in the "Report of The Commission on Proceedings Involving Guy Paul Morin" where he stated:

Recommendation 117: Creation of a Criminal Case Review Board.

The Government of Canada should study the advisability of the creation, by statute, of a criminal case review board to replace or supplement those powers currently exercised by the federal Minister of Justice pursuant to section 690 of the *Criminal Code*.¹⁰⁸

Commissioner Peter de C. Cory made a similar, but more concrete recommendation in the "Report of the Inquiry Regarding Thomas Sophonow" where he stated:

I recommend that, in the future, there should be a completely independent entity established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged. In the United Kingdom, an excellent model exists for such an institution. I hope that steps are taken to consider the establishment of a similar institution in Canada.¹⁰⁹

With Commissioner Cory's recommendation in 2001, a total of three public inquiries into wrongful convictions in Canada had recommended the creation of an independent review tribunal. Nevertheless,

107 Report of the Royal Commission on the Donald Marshall, Jr., Prosecution (Nova Scotia, 1989) Volume I at 145.
108 Report of The Commission on Proceedings Involving Guy Paul Morin (Ontario, 1998) Volume 2 at 1237.
109 Report of The Inquiry Regarding Thomas Sophonow (Manitoba, 2001). See <http://www.gov.mb.ca/justice/publications/sophonow/recommendations/english.html#wrongful>.

the federal Minister proceeded with legislative amendments to the s. 690 process in 2002 in favor of implementing an independent review tribunal. Section 690 was replaced with ss. 696.1 to 696.6 of the *Criminal Code* in 2002, but further change has been called for.

In the "Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell", Commissioner LeSage agreed with the recommendation advanced by Commissioner Cory in the Sophonow Inquiry. He stated:

In the *Thomas Sophonow Inquiry Report*, Commissioner Cory recommended that:

...there should be a completely independent entity established which can effectively, efficiently and quickly review cases in which wrongful conviction is alleged ...

I concur in this recommendation, especially in light of the submissions of the WPS, and the evidence of Chief Ewatski, recognizing the difficulties encountered with the post-conviction review process. In particular, I am concerned about the adversarial nature of the present process.¹¹⁰

The 1998 Consultation Paper cited above said of the review process:

A number of objections have been raised regarding the current section 690 process. In general, critics suggest that the present review procedure under section 690 is inadequate and should be replaced with an independent review mechanism. The criticisms may be summarized as follows:

- the role of the Minister of Justice as Chief Prosecutor is incompatible with the role of reviewing cases of persons wrongly convicted;
- the procedure has led to inordinate delays in the reviews of individual cases;
- the procedure is largely conducted in secret and is consequently without accountability;
- counsel who review section 690 applications are former prosecutors who will look at miscarriage of justice evidence with a prosecutorial bias and will therefore not investigate allegations of error in a fair and objective manner;
- only a handful of cases have ever been re-opened in Canada;
- the response of the Courts to the occasional section 690 referral has been unsatisfactory.¹¹¹

Noted as well in the 1998 Consultation Paper was the rejection, in 1991, by a federal-provincial-territorial working group of the Marshall Inquiry recommendations:

In 1989, the Royal Commission on the Donald Marshall, Jr. Prosecution recommended that provincial Ministers responsible for the administration of justice meet with the federal Justice Minister to consider creating an independent mechanism to facilitate the re-investigation of alleged cases of wrongful conviction.

A federal-provincial-territorial working group was established to examine the Marshall Inquiry recommendations and to report to the next meeting of Ministers. The working group

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Supra note 69 at 121.

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Supra note 1.

was satisfied with the existing section 690 procedures but recommended that compulsory powers to compel witnesses and documents would be desirable. In its report, tabled at the 1991 meeting of Ministers responsible for criminal justice, the working group rejected the recommendation of the Marshall Inquiry pertaining to the section 690 reform. It concluded that establishing an independent review body was undesirable because:

- the Marshall Inquiry did not criticize the section 690 review mechanisms that were in place at that time;
- persons who claim that they were wrongfully convicted had the full benefit of the presumption of innocence, a trial in which their guilt had been established beyond a reasonable doubt, and appeal procedures;
- a review mechanism would create another level of appeal that would detract from the notion of judicial finality;
- the establishment of a mechanism as proposed by the Marshall Inquiry would likely result in many requests for reviews, most of which would likely be *pro forma*. The proposed mechanism would permit the re-investigation of cases but would not provide any remedy for the wrongfully accused person;
- the review of these cases would incur significant costs that would divert resources from cases deserving review;
- section 690 of the *Criminal Code* enables the Minister of Justice to order a new trial or an appeal in appropriate cases;
- the section 690 process is independent from the prosecutions conducted by the provincial Attorneys General. It satisfies the requirement for an independent review mechanism, but could be improved by the provision of powers to compel individuals to testify; and
- the review of judicial decisions by a non-judicial body would be inappropriate.¹¹²

The reasons expressed for rejection of the Marshall Inquiry recommendations demonstrate a lack of understanding of the inevitability of wrongful convictions, which often occur for reasons which do not appear until the appeal process has been exhausted. As well, the reasons make a flood gate argument, that has not been proven in the CCRC experience.

In response to the 1998 Consultation Paper, AIDWYC filed a written submission with the Minister urging the creation of a system modeled on the British Criminal Cases Review Commission. Before this Commission, AIDWYC pointed out that the proposed legislative amendments to s. 690 were the subject of much discussion and debate by the Standing Committee on Justice and Human Rights in October 2001.¹¹³ The Standing Committee heard from the Minister of Justice, representatives of AIDWYC and senior counsel with the Criminal Conviction Review Group of the Department of Justice.

The debates of the Standing Committee on Justice and Human Rights indicate that the members recognized that there was an immediate need to reform the s. 690 process, and that while the proposed legislative amendments might not fully address all concerns with the conviction review process, they would constitute an improvement. It was discussed that further amendments could be considered once the recommendations from the Milgaard Inquiry were received. In particular, the members thought it

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Ibid.

House of Commons, Standing Committee on Justice and Human Rights, 37th. Parl. 1st sess., Nos. 22, 23 and 24 (October 2-4, 2001) online: Parliament of Canada, LEGISinfo <http://www.parl.gc.ca/LEGISinfo>.

important to hear from the Milgaard Inquiry on the question of whether an independent review body to investigate alleged wrongful convictions was necessary.

Sections 696.1 to 696.6 of the Criminal Code came into force on November 25, 2002. The Minister's decision to reform the conviction review process through legislative amendments was later explained:

From the submissions received, as well as other contributions from legal experts and interest groups, it was possible to identify several reform options for more detailed consideration. These options ranged from the creation of a separate agency to review criminal convictions, similar to the Criminal Cases Review Commission in the United Kingdom (a change long advocated by some critics of the old review process), to the elimination of section 690 altogether with a proposed broadening of the scope of appellate review.

After this broad consultation, a decision was arrived at whereby the federal Minister of Justice would retain the power to review criminal convictions, but legislative changes would be made to improve the process. These changes, known as the "reform model", represented a compromise position between a separate review agency similar to the United Kingdom model and the *status quo* under section 690 of the *Criminal Code*. The reform model had the full support of the provincial and territorial Attorneys General and Ministers of Justice. The Government of Canada then proceeded with legislative and non-legislative changes to implement the reform model.¹¹⁴

The reform model chosen was not a complete answer to the need for reform of the conviction review process. In particular, the role of the federal Minister was preserved, as was the reactive nature of the Minister's approach to applications for conviction review, and the threshold for the granting of a remedy.

This Commission will be the fifth provincial commission of inquiry to recommend the creation of an independent review body to investigate cases in which wrongful conviction is alleged. Such reform is necessary in order to adequately address the inevitability of wrongful convictions in this country. Public inquiries will continue to be desirable, or even necessary, in some situations, but they are very expensive exercises, and they are not the answer. The answer lies in the creation of an independent review body which will be able to investigate, detect and assist in remedying wrongful convictions.

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Canada, Minister of Justice, 2004 Annual Report on Applications for Ministerial Review – Miscarriages of Justice. See <http://www.canada.justice.gc.ca/eng/pi/ccr-rc/rep04-rap04/index.html>.

Chapter 7

Summary of Findings and Recommendations

Summary of Findings

I. The Conduct of the Investigation into the Death of Gail Miller

(a) General Findings Regarding 1969 Police Investigation into the Death of Gail Miller

1. The Saskatoon Police and the RCMP conducted a thorough and appropriate investigation of the Gail Miller murder.
2. The crime scene was appropriately preserved, examined, and recorded.

(b) Police Interaction with Key Witnesses

(i) Albert Cadrain

3. The evidence of Albert Cadrain was not improperly obtained by the police. Cadrain came to the Saskatoon Police voluntarily on March 2, 1969 and provided incriminating evidence against David Milgaard. No police pressure was exerted upon Cadrain to implicate Milgaard. The allegation that the police mistreated Cadrain and coerced incriminating evidence from him is unsupported by the facts and without merit.

4. Albert Cadrain was rational and showed no overt indications of being mentally ill at the time he gave his statement of March 2, 1969 and when he testified at trial. His mental illness, first diagnosed in 1973, was not apparent to investigators or prosecutors prior to David Milgaard's conviction (even if it existed before then). The police were justified in relying upon Cadrain and his evidence was handled appropriately throughout.

(ii) Initial Statements of Nichol John and Ron Wilson

5. The initial police statements of Ron Wilson and Nichol John did not include complete details of their activities on the morning of January 31, 1969. Continued questioning of these witnesses by the police was justified.
6. The decision to have Inspector Art Roberts of the Calgary Police Service conduct a polygraph test on Ron Wilson and Nichol John was reasonable. The summary prepared by Detective Sergeant Raymond Mackie was intended as an investigative aid and not as a blueprint for a case police were constructing against David Milgaard. The allegation that the Mackie Summary was prepared as a script for the police to follow in obtaining evidence from John and Wilson is without foundation.
7. After their initial police statements and prior to being interviewed by Art Roberts, Ron Wilson and Nichol John provided the police with further details of their activities on January 31, 1969. In particular, they told the police they stopped a woman for directions, that shortly thereafter their vehicle became stuck in the vicinity of the murder and that David Milgaard and Wilson left the vehicle in separate directions looking for help. Their accounts were generally consistent with what Milgaard had told his trial counsel, except with respect to the length of time Milgaard was away from their stuck vehicle. Wilson said it was 15 minutes, Milgaard said it was a short time and John said she was unable to recall.

(iii) Ron Wilson

8. In his May 23, 1969 interview with Art Roberts, Ron Wilson did not initially implicate David Milgaard in Gail Miller's murder. Roberts conducted a polygraph examination testing the veracity of Wilson's evidence, and then advised Wilson that the polygraph showed he was not being truthful in answering certain questions relating to Milgaard's involvement in Miller's murder. Wilson responded by changing his evidence to directly implicate Milgaard. He provided new information, which included an alleged confession by Milgaard, an identification of the murder weapon and an observation of blood on Milgaard's clothing. Roberts did not test the truthfulness of Wilson's new inculpatory evidence by polygraph.
9. Ron Wilson was turned over to the Saskatoon Police to whom he provided two written statements verifying the new information he disclosed to Art Roberts after the polygraph session.
10. The inculpatory evidence Ron Wilson provided to Art Roberts and the Saskatoon Police after the polygraph test is now known to have been unreliable.
11. The Commission lacks evidence to conclude that Art Roberts resorted to outright coercion during his interview with Ron Wilson, but whatever he said to him did not produce the truth. In the course of the polygraph examination and interview, Roberts somehow caused Wilson to tell him what Roberts thought to be the truth.

12. There was a critical failure to record the circumstances of Art Roberts' interview and polygraph of Ron Wilson including the questions asked and the polygraph results. Roberts did not provide a report of the interview and polygraph session.
13. Detective Eddie Karst was a highly experienced, honest and skilled investigator. He did not improperly induce Ron Wilson to make the statements that he gave on May 23 and 24, 1969.
14. The Saskatoon Police honestly and reasonably believed that Ron Wilson's inculpatory evidence provided to Art Roberts had been verified by the polygraph as being truthful, when it had not. In the circumstances, it was reasonable for the Saskatoon Police to rely on Wilson's evidence.

(iv) Nichol John

15. After the polygraph session with Ron Wilson, Art Roberts interviewed Nichol John. She initially denied that David Milgaard was involved in Gail Miller's murder, but after continued questioning by Roberts she told him that she just remembered witnessing Milgaard commit the murder. John was turned over to the Saskatoon Police and the next day gave a written statement to Raymond Mackie confirming the evidence she reported to Roberts.
16. The Commission lacks evidence to conclude that Art Roberts resorted to outright coercion during his interview with Nichol John, but whatever he said to her did not produce the truth. Roberts somehow pressured John into telling him what he thought to be the truth. There is a clear distinction to be made between coercing evidence from a witness in the sense of compelling assent or belief and using persuasive techniques such as repetitive questioning and suggestion.
17. There was a critical failure to record the circumstances surrounding Art Roberts' interview of Nichol John and the taking of John's statement by Raymond Mackie on May 24, 1969. Neither Roberts nor Mackie left a report as to the circumstances surrounding John's statement which must now be seen as the result of pressure by Roberts.
18. There is no evidence before the Commission to suggest that Nichol John was mistreated by the Saskatoon Police while staying in the cells on May 23, 1969 or that she was "hysterical". The origin of this story appears to be the 1981 interview of John where Joyce Milgaard told John her impression of what happened.

(v) David Milgaard

19. David Milgaard was cooperative with the police and provided blood, hair and saliva samples when requested of him.
20. David Milgaard was interviewed and questioned by the police in an appropriate manner. While Milgaard was cooperative, the police found some of his answers to be evasive. Milgaard could not initially give an accurate account of his whereabouts or his activities on the morning of January 31, 1969.

21. David Milgaard denied any involvement in the Gail Miller murder. However, the information he provided to the police confirmed that on the morning of January 31, 1969 he was in the general vicinity of the murder around the time it took place. He was looking for the Albert Cadrain residence located approximately one block from where Gail Miller's body was found, had stopped a woman to ask for directions and had been traveling in back lanes and became stuck in an alley.
22. Information provided to the police by one of David Milgaard's girlfriends in March, 1969 gave the police reason to believe that Milgaard was a person capable of a violent crime, even though his record revealed no such convictions.
23. In light of what the police knew in May, 1969, it was reasonable for them to focus on David Milgaard as a suspect for the murder and to continue to question Albert Cadrain, Ron Wilson and Nichol John.

(vi) Motel Room Incident Witnesses

24. In a motel room in May, 1969, David Milgaard pretended to stab a pillow uttering words to the effect that he stabbed, raped and killed Gail Miller. Each of his friends who were in the motel room have slightly different recollections of the precise words used; however, they all confirm that Milgaard stated that he stabbed and killed Miller. Milgaard admitted to his trial counsel, Calvin Tallis, that he was in the motel room with these people but was so stoned that he could not remember what he said and did, explaining that if he said and did what was attributed to him, it would have been a joke.
25. The police properly investigated and dealt with the motel room witnesses and were correct in bringing the motel re-enactment evidence to the prosecutor's attention.

(c) Autopsy and Forensic Investigation

26. Staff Sergeant Bruce Paynter's testing of the frozen substance found in the snow near Gail Miller's body was proper and he accurately confirmed it to be human semen. His search of the garments for semen stains met the expected standard of the day, given the tools available to him.
27. Vaginal aspirate from the victim was collected at the autopsy, found to contain semen and discarded. The victim's clothing was removed and left temporarily on the floor of the autopsy room exposing it to contamination. Both actions represented lapses in acceptable procedure, although they did not contribute to the wrongful conviction.

(d) Investigation of Sexual Assaults and Larry Fisher

28. During the course of the Gail Miller murder investigation through to the time of David Milgaard's conviction, Larry Fisher was not known to the Saskatoon Police. He was not a suspect in Miller's murder nor in the three attacks on Saskatoon women he committed in the months preceding Miller's murder.
29. Larry Fisher was interviewed by Saskatoon Police at the bus stop at Avenue O and 20th Street on February 3, 1969. He was interviewed as a potential witness and not as a suspect. Nothing in the police interview of Fisher gave reason for suspicion. Fisher escaped detection because he appeared to be just another passenger on a bus that Gail Miller used.

30. The three sexual assaults committed in Saskatoon in the fall of 1968 were diligently investigated by the Saskatoon Police and they later considered the possibility that the perpetrator of these assaults was also the killer of Gail Miller. David Milgaard became a suspect for the murder on March 2, 1969, but not for the sexual assaults, so police interest in a connection between the crimes gradually diminished.
31. The police did not overlook or ignore any evidence then available to them which would have linked the 1968 sexual assaults or Larry Fisher to the Gail Miller murder.
32. The police dealt appropriately with the complaint of a woman who was indecently assaulted on January 31, 1969 at 7:07 a.m., approximately seven blocks from the murder scene. The complaint was investigated for a possible connection to the Gail Miller murder. Due to the time of the assault, the distance from the Miller murder scene and the difference in the severity of the attacks, the police reasonably concluded that the complaint was unconnected to the Miller murder.

(e) Allegations of Police Misconduct

33. The issue of police misconduct was squarely before this Commission of Inquiry and there is no evidence that any police officer or police force was guilty of misconduct during the investigation of Gail Miller's death.
34. There is no evidence that David Milgaard was framed by the Saskatoon Police or any police officer. Based on the evidence gathered by the police, investigating officers held an honest and reasonable belief that Milgaard was responsible for the crime.
35. The police investigated more than 200 individuals as potential suspects in connection with Gail Miller's death. After David Milgaard became a suspect on March 2, 1969, the police continued to investigate other people, including at least 38 individuals of interest.
36. The police did not suffer from tunnel vision, which I take to mean focusing on David Milgaard as a suspect to the exclusion of all others. Rather, the Inquiry evidence showed that the police followed every lead they could identify, including the theory that one perpetrator could have been responsible for the 1968 sexual assaults and the Gail Miller murder.
37. The bone handled hunting knife found near the murder scene a number of weeks after the murder was irrelevant and unconnected to Gail Miller's murder. The knife was provided by the Saskatoon Police to the prosecutor and disclosed to David Milgaard's defence counsel. The allegation of misconduct with respect to the alleged disappearance of the knife is without merit.

II. Conduct of the Criminal Proceedings

(a) Prosecutor T.D.R. Caldwell

(i) General

38. T.D.R. Caldwell acted in good faith throughout the prosecution of David Milgaard.
39. T.D.R. Caldwell's conduct did not contribute to the wrongful conviction of David Milgaard. Caldwell offered evidence which he believed to be credible and relevant and did so in a spirit of cooperation with defence counsel.

40. T.D.R. Caldwell provided full cooperation to Calvin Tallis at trial.

(ii) Motel Room Incident

41. The accusation that T.D.R. Caldwell paid Craig Melnyk and George Lapchuk for their testimony at the David Milgaard trial in 1970 is false.
42. T.D.R. Caldwell did not promise Craig Melnyk and George Lapchuk favors for their testimony.

(iii) Disclosure

43. At the time of David Milgaard's trial, T.D.R. Caldwell and Calvin Tallis were not aware of the 1968 sexual assaults nor of any possible connection to Gail Miller's murder. The Saskatoon Police did not provide Caldwell with the police files relating to the unsolved 1968 sexual assaults nor did they inform Caldwell that the police considered a possible connection between the sexual assaults and the Miller murder.
44. T.D.R. Caldwell's disclosure to Calvin Tallis met the standards of the day. Due account was taken of the prosecutor's discretion in deciding what evidence tended to show the accused's innocence. Although exercising his discretion in good faith, Caldwell did not disclose some evidence from witnesses who told the police that they had seen nothing unusual in the neighbourhood of the crime scene at relevant times (even though they were in a position to have seen activity), or evidence of the indecent assault which reportedly occurred almost contemporaneously with the murder. This non-disclosure was the product of an honest, if mistaken, belief by Caldwell that the evidence was not useful to the defence.

(b) Defence Counsel Calvin Tallis

45. Calvin Tallis' preparation for trial was thorough. He met frequently with the prosecutor before the preliminary inquiry to hear what evidence the Crown had and what it intended to lead at trial. He properly informed his client of progress in the case and offered timely advice. His advocacy at both the preliminary inquiry and the trial was skilled and ethical. His client, David Milgaard, received a sophisticated, dedicated and nuanced defence.
46. Calvin Tallis' conduct did not contribute to the wrongful conviction of David Milgaard.
47. Ron Wilson's exculpatory March 3, 1969 statement to the police was provided by T.D.R. Caldwell to Calvin Tallis on August 15, 1969 prior to commencement of the preliminary inquiry. Caldwell was later publicly accused of not producing it and Tallis was criticized for not referring to it at trial. But, at the preliminary inquiry and trial, Tallis specifically questioned Wilson about his initial police interview and the March 3 statement. For sound tactical reasons, Tallis did not show the statement to Wilson during his testimony, nor did he seek to introduce the document as evidence, fearing that the Crown would ask to have Wilson's later more incriminating statements made exhibits as well.
48. The decision for David Milgaard not to testify at his trial, was that of Milgaard and his parents, taken on the advice of defence counsel Calvin Tallis. It was an informed decision, made on the advice of a seasoned, ethical defence lawyer who had taken all relevant factors into account.

(c) Conduct of the Trial

(i) Role of Prosecutor and Defence Counsel

49. The trial was conducted competently and fairly by both prosecutor and defence counsel.
50. The allegation that T.D.R. Caldwell and Calvin Tallis colluded to put David Milgaard away and that Tallis gave Milgaard a token defence is completely unfounded.

(ii) Secretor Evidence

51. The forensic evidence at trial relating to the semen found near Gail Miller's body was either exculpatory or neutral and thus played no role in the conviction of David Milgaard.

(iii) Nichol John's Evidence and Application of s. 9(2) of the *Canada Evidence Act*

52. In her May 24, 1969 police statement, Nichol John said that she saw David Milgaard grab a girl in the alley and stab her. At trial John did not repeat this evidence.
53. T.D.R. Caldwell applied to the trial judge under s. 9(2) of the *Canada Evidence Act* to use Nichol John's May 24, 1969 statement to challenge the credibility of her trial evidence. The trial judge failed to follow the proper procedure and allowed Caldwell to read the May 24, 1969 statement to John in the jury's presence. Although John did not subsequently adopt the most incriminating parts of her statement as her trial evidence, the jury became aware that she had previously told police that she witnessed David Milgaard commit the murder.
54. Before allowing the jury to learn of Nichol John's previous statement and its contents, the trial judge should have held a *voir dire*, in the absence of the jury. The purpose of the *voir dire* would have been to enable T.D.R. Caldwell to prove the statement and to provide Calvin Tallis with an opportunity to probe the circumstances surrounding the taking of the statement, to show that due to the manner in which the statement was obtained by the police, introduction of the statement and cross-examination on it would be improper.
55. Calvin Tallis should have been allowed to cross-examine Nichol John in the absence of the jury. He could have aggressively questioned John about her dealings with the police without fear of an adverse answer from John being accepted by the jury. Tallis could also have cross-examined Raymond Mackie and Art Roberts, in the absence of the jury, about the circumstances of Roberts' questioning of John and Mackie's taking of her statement. This may have resulted in a ruling by the trial judge that T.D.R. Caldwell could not use the May 24, 1969 statement to cross-examine John, due to the circumstances in which the statement was obtained. Instead, Tallis was denied these opportunities and the jury heard the most incriminating portions of John's May 24 statement before Tallis even had a chance to question her.
56. During the course of T.D.R. Caldwell's cross-examination of Nichol John on her statement, the trial judge persistently intervened and effectively destroyed the credibility of John's evidence that she could not remember or recall the most incriminating parts of her statement. The trial judge's questioning of John left the impression that John's failure to recall was not genuine. In the result, the jury was likely to conclude that the truth lay in her May 24 statement.

57. When Calvin Tallis finally had a chance to question Nichol John, he had no ability to cross-examine her about the incriminating things she now said she could not remember because she had not adopted them as her evidence. As a result, John's unadopted eyewitness account of the murder went untested and was heard by the jury.
58. The trial judge's instructions to the jury about disregarding the portions of Nichol John's May 24, 1969 statement which she did not adopt on the stand amounted to an effort at damage control, which could not repair the trial judge's destruction of her credibility in front of the jury nor his error in failing to permit cross-examination in the jury's absence on the circumstances of her statement.
59. On appeal, the Saskatchewan Court of Appeal found that the trial judge made a procedural error in failing to hold a *voir dire* regarding the circumstances under which Nichol John's statement was provided. However, the Court concluded that David Milgaard suffered no prejudice as a result of the improper procedure utilized by the trial judge. The Saskatchewan Court of Appeal was wrong in reaching this conclusion. Evidence at the Inquiry established that the defence was prejudiced by this error. Allowing the jury to hear John's statement was a turning point in the trial and instrumental in Milgaard's conviction. Had Calvin Tallis been allowed to cross-examine John, Art Roberts and Raymond Mackie in the absence of the jury, he might have revealed circumstances in John's handling by Saskatoon Police and by Roberts which might have convinced the judge to withhold the out of court statement from the jury. What happened instead was disastrous for the defence.
60. The fact that the jury heard Nichol John's May 24, 1969 statement could have led them to accept it as corroboration of Ron Wilson's trial evidence.
61. The combination of legal error respecting the application of s. 9(2) of the *Canada Evidence Act* and Chief Justice Bence's impatience respecting the evidence given by Nichol John at trial probably contributed to the wrongful conviction of David Milgaard.

III. Investigation and Prosecution of Larry Fisher for 1968 and 1970 Rapes and Indecent Assault

62. In the investigation and prosecution of Larry Fisher for the three rapes and one indecent assault committed in Saskatoon in 1968 and 1970, neither the Saskatoon Police nor Crown officials connected Fisher or his crimes to the Gail Miller murder. There was no cover-up by Saskatoon Police or Crown officials respecting Fisher's guilty pleas and convictions in December 1971 in Regina for the rapes and indecent assault.
63. Eddie Karst, who interviewed Larry Fisher in October, 1970, did not connect Fisher to the Gail Miller murder.
64. There was nothing inappropriate about the procedure employed by Crown officials to accept Larry Fisher's guilty pleas. In particular, the direct indictment procedure, the change of venue to Regina, the timing of the guilty pleas and the agreement to concurrent sentences were all adequately explained to the satisfaction of the Commission. There was no evidence that the authorities conspired to deal with Fisher's charges in a way to avoid publicity with a view to preventing detection by David Milgaard or the public of a connection to the Gail Miller murder.

65. Saskatoon Police files relating to the Fisher sexual assaults were apparently lost or destroyed in the course of movement to new premises, or culled. They were not concealed or destroyed by police or Crown officials, in an effort to hide Larry Fisher's crimes.
66. Serge Kujawa did nothing wrong in his official duties relating to either the Milgaard appeal or the prosecution of Larry Fisher. In particular, he did not connect Fisher to the Gail Miller murder. There was no attempt on his part to delay resolution of the Fisher files or to conceal them from the public.

IV. Post-Conviction Information Received by Police

(a) Linda Fisher Visit to Saskatoon Police in 1980

67. On August 28, 1980 Linda Fisher reported to Saskatoon Police that she believed her ex-husband, Larry Fisher, was responsible for the Gail Miller murder. The report was received, filed, referred, and possibly evaluated on a cursory basis by the Saskatoon Police but it went no further. It should have.
68. The failure of the Saskatoon Police to follow up on Linda Fisher's report was a decision made in good faith, but it was a mistake.
69. Although the Linda Fisher report to police pre-dated by many years any possible recourse to DNA typing, it might have led to the identification of Larry Fisher as a serious suspect in 1980. Had follow up been done, Fisher's movements on the morning of the murder could have been verified, the similarity of his other rapes considered and fresh evidence made available to David Milgaard on the basis of which he could have launched a realistic application for mercy under the *Criminal Code*.
70. Linda Fisher's 1980 statement to the Saskatoon Police did not receive the attention it deserved. The investigation into the death of Gail Miller should have been reopened in 1980 at least to the extent of questioning Larry Fisher and verifying his movements on January 31, 1969.

(b) Bruce Lafreniere's Visit to RCMP in the Mid-1980s

71. Bruce Lafreniere, the individual responsible for providing Hersh Wolch with Larry Fisher's name in 1990, told the Inquiry that he made a visit to the Shellbrook RCMP detachment in the mid-1980s to report his suspicions regarding Larry Fisher's involvement in the Gail Miller murder. The RCMP have no record of a report being made and the officer allegedly involved has no recollection of a visit by Lafreniere.
72. There was no proven failure by the RCMP to take appropriate action with respect to Bruce Lafreniere's possible report to the RCMP in Shellbrook in the mid-1980s about information he had linking Larry Fisher to the Gail Miller murder.

V. Post-Conviction Information Received by Saskatchewan Justice and Police

(a) Information Provided by the Milgaards to the Federal Justice Minister in the s. 690 Proceedings and Subsequently Received by Saskatchewan Justice and Police

(i) Ferris Report

73. The September 13, 1988 report of Dr. James Ferris did not prove David Milgaard's innocence. The report was a reinterpretation of trial evidence which was before the jury and Saskatchewan Justice recognized it as such.
74. Dr. Ferris had not read nor been provided with certain key documents from the trial before providing his opinion to the Milgaards. This set in motion a long, unnecessary and inaccurate media campaign and investigation.
75. Although Dr. Ferris' report received wide publicity and came to the attention of Saskatchewan Justice and the police, it was not information which should have caused them to question the safety of the conviction or to reopen Gail Miller's murder investigation.

(ii) Motel Room Incident

76. It is clear that the May 1969 motel room incident happened. Although the incident was perceived differently by those in attendance, Deborah Hall's allegation that the trial evidence of Craig Melnyk and George Lapchuk was fabricated is without merit.
77. Instead of explaining it as a crude joke by a stoned but innocent teenager responding to teasing from his friends, the Milgaards repeatedly and publicly alleged that the motel room incident had not occurred, that witnesses had fabricated evidence and that the Crown and the police had acted improperly in obtaining and presenting the evidence at trial. In the result, witnesses were branded as liars in the media and authorities who dealt with them were unjustly criticized.

(iii) Police Treatment of Albert Cadrain

78. Albert Cadrain's June 24, 1990 statement to Paul Henderson was not credible. Cadrain did not recant his trial evidence about seeing blood on David Milgaard's clothes. The allegation that the police mistreated Cadrain and coerced incriminating evidence from him is baseless. Cadrain came to the Saskatoon Police voluntarily and provided incriminating evidence against Milgaard.

(iv) Ron Wilson Recantation

79. Paul Henderson introduced his theory of police manipulation, coercion and pressure to Ron Wilson during their June 4, 1990 discussion. The statement taken by Henderson from Wilson on June 4, 1990 lacked credibility. Henderson failed to consider that there might have been reasons other than police misconduct which caused Wilson to lie to the police and at trial.
80. Ron Wilson was not the source of any information coming to the attention of Saskatchewan Justice or the police which should have caused them to reopen the investigation into the death of Gail Miller.

(v) Dog Urine Allegation

81. The allegation that the semen found near Gail Miller's body may have been or was in fact dog urine was contrived and false.
82. The dog urine allegation was advanced in the media by the Milgaard group to discredit the police officers who gathered and analyzed the semen and the prosecutor who tendered it as evidence at trial. The dog urine allegation negatively affected the credibility of David Milgaard's reopening efforts.

(vi) Larry Fisher

83. Larry Fisher first came to the attention of the Milgaard group in 1983 as a convicted rapist who had lived in the basement of the Albert Cadrain home at the time of Gail Miller's murder. This information was not included in the first s. 690 application filed with the federal Minister on December 28, 1988.
84. Larry Fisher came to the attention of the Milgaard group again in February 1990 when Hersh Wolch received an anonymous tip that Fisher was responsible for the murder of Gail Miller. The information was added to the first s. 690 application and was fully investigated by the RCMP at the direction of Justice Canada but no evidence linking Fisher to the Miller murder was found. It was reasonable for Saskatchewan Justice and the police to rely on the Justice Canada and RCMP investigation of this information.

(b) Decision of Federal Minister on First s. 690 Application – February 27, 1991

85. Saskatchewan Justice was not directly involved in David Milgaard's first s. 690 application to the federal Minister and they did not participate in the investigation, the review, or the decision making process. Saskatchewan Justice and police relied upon the federal Minister's decision of February 27, 1991 dismissing Milgaard's application and took no steps to reopen the investigation into Gail Miller's death.
86. Saskatchewan Justice and police were aware of the allegation in David Milgaard's s. 690 application that Larry Fisher was Gail Miller's killer but they also knew that the allegation had been investigated by the RCMP and considered by the federal Minister in dismissing the application. Relying upon that, they did not reopen the investigation. This decision was reasonable given that the RCMP had investigated Fisher and could not find evidence linking him to the Miller murder.

(c) Information Received by Saskatchewan Justice Through the Media

87. The Milgaards used the media to seek public support for David Milgaard's case and to pressure authorities to take steps to reopen the investigation. While the media campaign had public appeal, much of the information put forward by the Milgaards and reported in the media was inflammatory, inaccurate and misleading.
88. The publication of incorrect information alleging that T.D.R. Caldwell failed to provide Calvin Tallis with Ron Wilson's initial statement to the police in 1969 was counter-productive and should not have caused authorities to reopen the investigation into the death of Gail Miller.

89. The media campaign played a significant role in David Milgaard's reopening efforts but was counter-productive in convincing the federal Minister, Saskatchewan Justice or the police that Milgaard's position had merit. The manner in which information was communicated through the media and its lack of credibility were factors which influenced the authorities in their decision making.
90. Joyce Milgaard's inherent distrust of those involved in the investigation and prosecution of her son caused her to reach premature and incorrect conclusions about wrongdoing on the part of the police, the Crown, the witnesses and even David Milgaard's trial counsel. Unfounded allegations were made with the result that authorities doubted the credibility of any information she provided.
91. In addition to undermining the credibility of David Milgaard's case for reopening, the media campaign weakened confidence in the administration of justice and unfairly hurt the reputation of many individuals involved in the investigation, trial and review of Milgaard's conviction.

(d) Information Received by Saskatchewan Justice During the Second s. 690 Application and the Supreme Court Reference Case

92. When the Reference Case was ordered on November 28, 1991 in response to David Milgaard's second s. 690 application, Saskatchewan Justice became an active participant in the process of Milgaard's conviction review and received all information disclosed in the Supreme Court of Canada proceedings.
93. Police and prosecutorial misconduct in the investigation and prosecution of David Milgaard was an issue squarely before the Supreme Court of Canada on the Reference Case. The Supreme Court of Canada found no wrongdoing or misconduct on the part of the police or the Crown in the investigation and prosecution of Milgaard. This finding was relied upon by Saskatchewan Justice in deciding not to reopen the Miller murder investigation.
94. Before the Supreme Court of Canada, David Milgaard's legal counsel argued that Larry Fisher was responsible for Gail Miller's death. The Supreme Court of Canada heard evidence from both Milgaard and Fisher and concluded that Milgaard had not established his innocence. This finding was relied upon by Saskatchewan Justice in deciding not to reopen the Miller murder investigation.
95. Based on all of the information received during the Reference Case and in light of the Supreme Court of Canada decision, Saskatchewan Justice decided not to reopen the investigation into the death of Gail Miller and to enter a stay of proceedings rather than to hold a new trial against David Milgaard. Both decisions were reasonable in the circumstances.

VI. Detection and Remedying of David Milgaard's Wrongful Conviction

96. The criminal justice system failed David Milgaard because his wrongful conviction was not detected and remedied as early as it should have been.

97. The conviction review system in Canada is reactive and places too heavy an onus on the wrongfully convicted. The successful remedying of a wrongful conviction depends upon the wrongfully convicted person being able to identify credible grounds to challenge the safety of the conviction and convince the federal Minister of Justice that the conviction warrants a further review by the Court. In practice, only those grounds advanced by an applicant are investigated.
98. The conviction review system in Canada is premised on the belief that wrongful convictions are rare and that any remedy granted by the federal Minister is extraordinary. Change is needed to reflect the inevitability of wrongful convictions and the responsibility of the criminal justice system to detect and correct its own errors.
99. A wrongfully convicted person should not bear the responsibility of investigating his own conviction in order to identify all grounds needed to support a remedy. It is beyond the means and abilities of most wrongfully convicted persons to do so, because they are usually not in the best position to identify credible grounds in a timely manner.
100. In the case of David Milgaard, the onus of identifying credible grounds in a timely manner was a heavy one that was simply beyond the means and abilities of Milgaard and his supporters. They investigated his conviction for eight years before they filed an application for review with the federal Minister, relying on two grounds that were quickly determined to have no merit.
101. If an independent agency such as the United Kingdom's Criminal Cases Review Commission had been in place to investigate David Milgaard's case, it is likely, with its proactive methods and expertise, that credible grounds would have been identified much earlier than they were, even though Milgaard had not raised them.
102. The federal Minister of Justice should not be the gatekeeper to determine whether an alleged wrongful conviction should be returned to the Court for further review. The involvement of a federal politician in the review of individual cases of alleged wrongful conviction invites public advocacy and accusations of political influence. The office of the federal Minister, identified as it is by the public with prosecutions, and being occupied by a political figure, does not lend itself well to the adjudication of issues which arise in the judicial system and are to be returned there.
103. As long as responsibility for conviction review remains with the federal Minister of Justice, there will be the potential for political pressure and public advocacy to play a role in the decision making process, or, at the very least, for the perception to exist that the decision can be so influenced. The conviction review process must not only be truly independent, it must be seen to be independent.

VII. Publication of Michael Breckenridge Allegations

104. The Michael Breckenridge allegations were completely false. Their publication destroyed the credibility of the Milgaard group and any chance of Saskatchewan Justice agreeing to reopen the investigation into the death of Gail Miller before DNA results were announced in July of 1997.

105. The Michael Breckenridge allegations were damaging to reputations and counter-productive to the Milgaard reopening effort. The investigation of the allegations by the RCMP resulted in a major and unnecessary public expense.

VIII. RCMP Investigation

106. The 1993 RCMP investigation (Project Flicker) in response to the Michael Breckenridge allegations was lengthy, sophisticated, costly and comprehensive. No fewer than 68 allegations of conduct amounting to obstruction of justice were investigated. In the result, the Alberta Justice Report and the RCMP Report concluded that there was no criminal wrongdoing nor any attempt to obstruct justice in the investigation or prosecution of David Milgaard.
107. The ambit of the RCMP inquiry reached beyond the targets of the Michael Breckenridge allegations and amounted to a reinvestigation of the death of Gail Miller.
108. The RCMP Report and the Alberta Justice Report did not provide information which should have caused the police or Saskatchewan Justice to reopen the investigation into the death of Gail Miller.

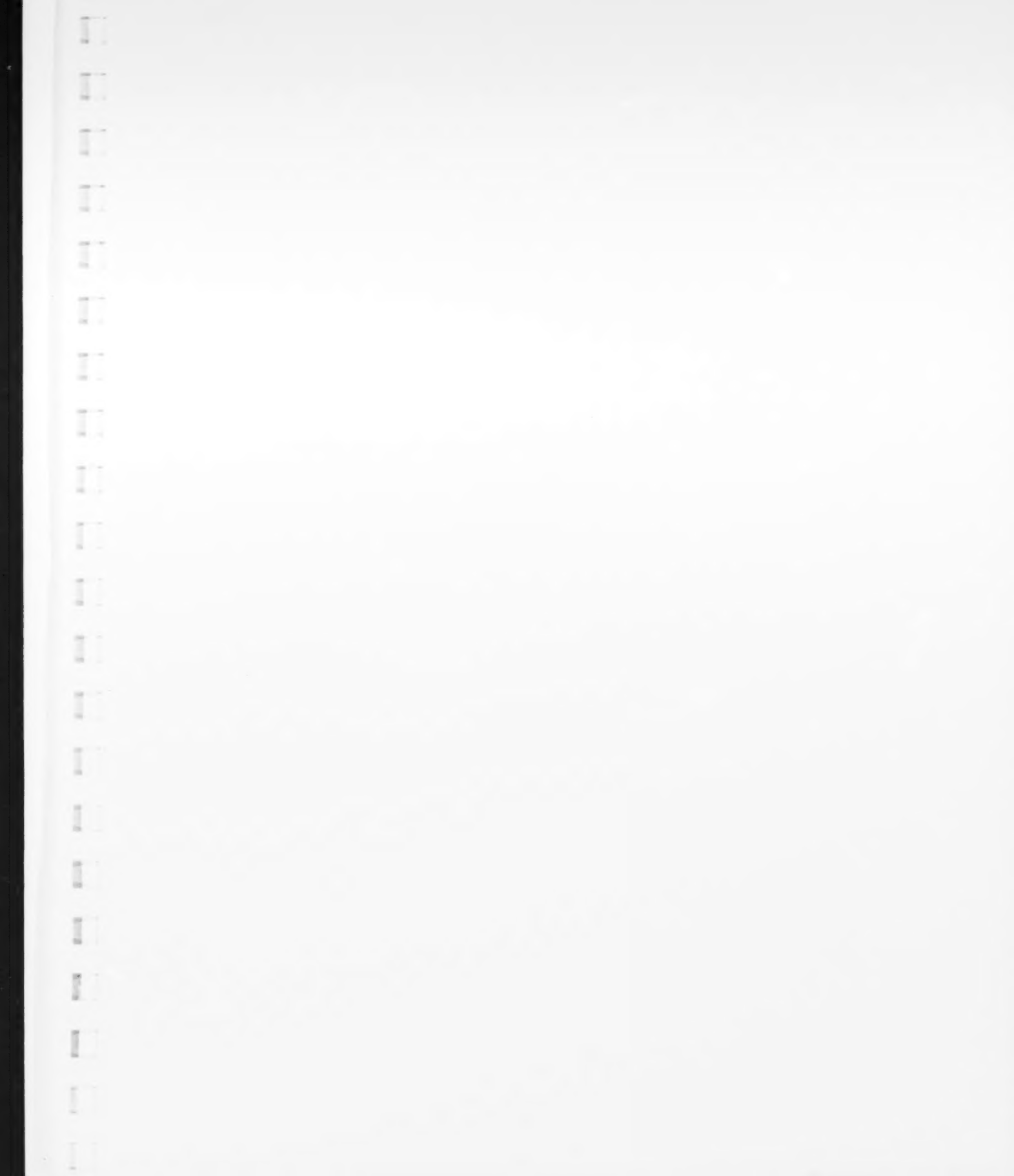
IX. DNA

109. No DNA based information came to the attention of Saskatchewan Justice or the police prior to 1997 which should have caused them to reopen the investigation into the death of Gail Miller.
110. In hindsight, discarding the vaginal aspirate taken from Gail Miller's body during the autopsy in 1969 was unfortunate. DNA typing was not possible nor even contemplated in 1969. However, the vaginal aspirate might eventually have provided material for DNA typing, especially since the full extent of the semen staining on Miller's clothing went undetected until 1997.
111. Semen stained material from the victim's panties was wasted in Dr. Ferris' laboratory in 1988 and further semen staining on Gail Miller's clothing was missed by RCMP analyst Patricia Alain in 1992. Alain's failure to detect the larger semen stains on the clothing in 1992 was due to inadequate testing facilities in the RCMP laboratory in Ottawa.
112. Full and proper testing of the items by the Forensic Science Services laboratory in England in 1992 could have identified the full extent of the staining, excluded David Milgaard as the donor and implicated Larry Fisher to a limited degree (within limits of one in fifty) using the DQ Alpha method. Scientific advances by 1994 meant that had the Forensic Science Services laboratory in England tested the items then or later using the STR Quad method, results from the panties and the dress would have provided strong evidence that Fisher was the donor.
113. Successful DNA testing might also have been available earlier than 1997 had the parties been able to agree sooner on the testing method to be used. There was no delay attributable to Saskatchewan Justice or police.

Recommendations

Number	Recommendation
1	Dedicated medical examiner's facilities should be established in one or more major centres where all autopsies deemed necessary in cases of sudden death would be performed by qualified forensic pathologists in the service of the province.
2	There should be mandatory sharing of investigation reports between all police forces assisting in major cases. The reports should be directed to the file manager to become part of the major case management file.
3	Municipal police forces within the province who ask for assistance from the RCMP should ensure that they have in place a written agreement describing the terms, conditions and responsibilities of inter-agency relationships pursuant to the Saskatchewan Police Commission Policy Manual for Saskatchewan Municipal Police Services (2004).
4	Police should ensure that every statement taken from a young person in a major case, whether as a witness or a suspect, is both audio recorded and video recorded.
5	The <i>Criminal Code</i> should be amended to permit academic inquiry into jury deliberations with a view to gathering evidence of the extent to which jurors accept and apply instructions on the admissibility of evidence, particularly relating to inconsistent out of court statements. Amendments to s. 9 of the <i>Canada Evidence Act</i> should then be considered.
6	Every complaint to police calling into question the safety of a conviction should be referred to the Director of Public Prosecutions.
7	For the better administration of justice in this province I recommend that prosecutors desist from unsolicited contact with the National Parole Board. If asked, they should confine recitation of the facts of a case to those found by the courts as expressed in the reasons of a judge sitting alone, or in a jury trial to those cited by the judge in reasons on sentencing. Prosecutors should avoid leaving the impression that they are heavily invested in a case on a personal level.
8	In all homicide cases, all trial exhibits capable of yielding forensic samples should be preserved for a minimum of 10 years. Convicted persons should be given notice after 10 years of the impending destruction of exhibits relating to their trials, allowing applications for extensions.
9	In all indictable offence cases, documentary exhibits should be scanned and stored electronically, unless a court orders otherwise.

Number	Recommendation
10	All prosecution and police files, including police notebooks, relating to indictable offences should be retained in their original form for a year, then scanned and entered into a database where a permanent, secure electronic record can be kept.
11	Victims of crime should be informed of the resolution of their cases.
12	Compensation for wrongful conviction lies within the purview of the Executive and should remain there, but factual innocence, as the sole criterion for paying compensation, is unduly restrictive. Where a miscarriage of justice has resulted from an obvious breach of good faith in the application of standards expected of police, prosecution, or the courts, the door to compensation should not be closed for lack of proof of factual innocence.
13	The investigation of claims of wrongful conviction should be done by a review agency independent of government, established along the model of the English Criminal Cases Review Commission, replacing ministerial review under s. 696.1 of the <i>Criminal Code</i> . The review agency would report directly to the Court of Appeal of the province or territory which registered the conviction.



On February 20, 2004, the Saskatchewan Minister of Justice announced the appointment of the Honourable Mr. Justice Edward P. MacCallum to conduct a Commission of Inquiry into the Wrongful Conviction of David Milgaard.

The Commission was given the responsibility to inquire into any and all aspects of the conduct of the investigation into the death of Gail Miller and the subsequent criminal proceedings resulting in the wrongful conviction of David Milgaard. The Commission also had the responsibility to seek to determine whether the investigation should have been reopened based on information subsequently received by the police and the Department of Justice.

